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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DR. MARKCUS KITCHENS, JR., : CIVIL CASE NUMBER
PLAINTIFF :
 :
VERSUS : 22-3301
 :
UNITED STATES MEDICAL :
LICENSING EXAMINATION, :
DEFENDANTS :

MAY 18, 2023
VIA MICROSOFT TEAMS
PHILADELPHIA, PA 19106

BEFORE THE HONORABLE JOHN F. MURPHY, J.

BENCH TRIAL - DAY 4

APPEARANCES:

DR. MARKCUS KITCHENS, JR.
PRO SE
625 HAMPTON WAY, #2
RICHMOND, KY 40475

LYNN GLIGOR, RMR
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PROCEEDINGS RECORDED BY STENOGRAPHY-COMPUTER,
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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1 (CLERK OPENS COURT.)

2 THE COURT: GOOD MORNING, MS. MEW.

3 GOOD MORNING, DR. KITCHENS.

4 DR. KITCHENS: GOOD MORNING, JUDGE.

5 THE COURT: LET'S SEE, I HAVE ONE PIECE
6 OF BUSINESS. ONE IS A REMINDER THAT WE ARE GOING TO
7 STOP AT ABOUT 10 OF 9, 8:50. I HAVE A CONFERENCE THAT
8 STARTS AT 9:00. IT SHOULD ONLY BE 10, 15 MINUTES, SO
9 WHY DON'T WE -- WE WILL PLAN TO RESUME AT 9:20. OKAY,
10 SO WE WILL TAKE A 30-MINUTE BREAK FROM 8:50 TO 9:20, ALL
11 RIGHT?

12 MS. MEW: OKAY.

13 THE COURT: THE OTHER IS I GOT A BIT OF
14 AN OMINOUS E-MAIL FROM OUR I.T. DEPARTMENT SAYING THAT
15 THEY WERE GOING TO BE DOING A MICROSOFT TEAMS UPDATE
16 TODAY. AND MY DEPUTY TELLS ME THAT WILL NOT EFFECT THIS
17 TRIAL, I DON'T KNOW, MY CONFIDENCE LEVEL IS LIKE 50/50.

18 SO IF THIS JUST EXPLODES AND SHUTS DOWN,
19 THAT'S WHAT HAPPENED AND WE WILL FIGURE IT OUT FROM
20 THERE, OKAY?

21 MS. MEW: OKAY.

22 THE COURT: ALL RIGHT. DO EITHER OF YOU
23 HAVE ANY BUSINESS FOR ME?

24 MS. MEW: NOT FROM ME, YOUR HONOR.

25 DR. KITCHENS: NOT FROM ME AS WELL, YOUR

1 HONOR.

2 THE COURT: ALL RIGHT. IN THAT CASE, MS.
3 MEW, YOU MAY PROCEED AND CALL YOUR NEXT WITNESS.

4 MS. MEW: THANK YOU, YOUR HONOR.

5 THE NATIONAL BOARD OF MEDICAL EXAMINERS
6 CALLS DR. TIMOTHY ALLEN.

7 THE COURT: GOOD MORNING, DR. ALLEN.

8 THE WITNESS: GOOD MORNING, YOUR HONOR.

9 THE COURT: LYNN, WOULD YOU PLEASE SWEAR
10 IN THE WITNESS.

11 THE COURT REPORTER: GOOD MORNING, DR.
12 ALLEN. COULD YOU PLEASE RAISE YOUR RIGHT HAND?

13 (DEFENSE WITNESS, DR. TIMOTHY ALLEN, IS
14 SWORN.)

15 THE COURT REPORTER: CAN YOU PLEASE STATE
16 AND SPELL YOUR NAME FOR THE RECORD?

17 THE WITNESS: TIMOTHY ALLEN,
18 T-I-M-O-T-H-Y A-L-L-E-N.

19 DIRECT EXAMINATION

20 BY MS. MEW:

21 Q. GOOD MORNING, DR. ALLEN.

22 A. HELLO.

23 Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?

24 A. SO, I GRADUATED FROM THE UNIVERSITY OF
25 LOUISVILLE WITH A BACHELOR'S DEGREE IN POLITICAL SCIENCE

1 IN 1994, WENT TO UK COLLEGE OF MEDICINE, GOT MY M.D. IN
2 1998. I COMPLETED A PSYCHIATRY RESIDENCY AT UK IN 2002,
3 AND A FORENSIC PSYCHIATRY FELLOWSHIP AT TULANE
4 UNIVERSITY IN NEW ORLEANS IN 2003.

5 I GUESS THAT'S THE END OF THE EDUCATION
6 PART, ANYWAY.

7 Q. ARE YOU A LICENSED PHYSICIAN?

8 A. YES. SO I AM LICENSED TO PRACTICE IN KENTUCKY
9 SINCE 1999. I ALSO HAVE LICENSES IN WEST VIRGINIA,
10 TENNESSEE AND OKLAHOMA.

11 Q. DO YOU HAVE ANY PARTICULAR SPECIALTIES?

12 A. YES, I DO. SO ALONG WITH MY RESIDENCY TRAINING,
13 I AM BOARD CERTIFIED BY THE AMERICAN PSYCHIATRY AND
14 NEUROLOGY AND GENERAL PSYCHIATRY AND FORENSIC
15 PSYCHIATRY, AND THEN I ADDED BRAIN INJURY MEDICINE IN
16 THE LAST FEW YEAR, WHICH IS A NEW SUBSPECIALTY
17 AVAILABLE.

18 Q. WHERE ARE YOU CURRENTLY EMPLOYED?

19 A. SO I HAVE A FEW EMPLOYMENTS. I AM A PART-TIME
20 FACULTY MEMBER AT THE UNIVERSITY OF KENTUCKY IN THE
21 DEPARTMENT OF PSYCHIATRY, I HAVE BEEN SINCE 2003. I WAS
22 FULL-TIME FOR SEVEN YEARS AND HAVE BEEN PART-TIME SINCE.
23 I WORK PART-TIME FOR A STATE AGENCY IN KENTUCKY FOR THE
24 CABINET -- FOR HEALTH AND FAMILY SERVICES PROVIDING
25 ASSESSMENTS OF CRIMINAL DEFENDANTS FOR COMPETENCY TO

1 STAND TRIAL, CRIMINAL RESPONSIBILITY. AND THEN I HAVE A
2 PRIVATE PRACTICE WHERE I DO EVALUATIONS, FITNESS REVIEW
3 EVALUATIONS, I DO INDEPENDENT MEDICAL EXAMS AND I ALSO
4 HAVE A TREATMENT PRACTICE OF TRANSCRANIAL MAGNETIC
5 STIMULATION FOR REFRACTORY DEPRESSION.

6 Q. WHAT IS FORENSIC PSYCHIATRY?

7 A. SO FORENSIC PSYCHIATRY, AS I MENTIONED, IS A
8 BOARD RECOGNIZED SUBSPECIALTY OF PSYCHIATRY WHERE IT
9 SORT OF INTERFACES BETWEEN MENTAL ILLNESS AND LEGAL
10 PROCESS, AT LAST HALF OF THAT IS CRIMINAL. IT'S A
11 COMPETENCY TO STAND TRIAL CRIMINAL RESPONSIBILITY
12 COMPONENT, THAT IS A BIG PART OF MY PROFESSIONAL LIFE.

13 BUT THEN ALSO THERE IS A CIVIL COMPONENT
14 WHICH CAN BE REVIEWING MEDICAL MALPRACTICE CASES,
15 REVIEWING FITNESS FOR DUTY OR DANGEROUSNESS ASSESSMENTS,
16 DISABILITY ASSESSMENTS AND INDEPENDENT MEDICAL
17 EXAMINATIONS.

18 AND THE TRAINING INCLUDES SOME BASIC
19 UNDERSTANDING OF CASE LAW, OF CONSTITUTIONAL LAW, DUE
20 PROCESS, EQUAL PROTECTION, THAT SORT OF THING. BUT ALSO
21 HOW TO PROVIDE SCIENTIFIC EVIDENCE TO A LEGAL PROCESS,
22 BECAUSE THE TERMS ARE DIFFERENT, THE STANDARDS ARE
23 DIFFERENT, AND SO IT'S NOT ALWAYS THAT EASY. AND SO IN
24 THAT TRAINING WE LEARN SOMETHING ABOUT THAT.

25 Q. YOU ALSO TREAT PATIENTS ON A REGULAR BASIS?

1 A. I DO. SO ABOUT -- PUT IT ALL TOGETHER, ABOUT
2 HALF OF MY TIME I AM TREATING BOTH AT UK DOING CLINICS,
3 TEACHING RESIDENTS AT THE SAME TIME, I AM SEEING
4 PATIENTS PHYSICALLY, THE RESIDENTS ARE THERE, I'M THERE
5 AND THE PATIENTS ARE THERE. AND SO THAT IS A WEEKLY
6 CLINIC I DO.

7 I TREAT INPATIENTS AT THE FORENSIC
8 HOSPITAL WHERE I DO THE CRIMINAL ASSESSMENTS, AND THEN I
9 TREAT PATIENTS IN MY PRIVATE PRACTICE WITH THE TMS THAT
10 I MENTIONED EARLIER.

11 Q. I WILL PULL UP EXHIBIT DX57.

12 DR. ALLEN, IS THIS A TRUE AND CORRECT
13 COPY OF YOUR C.V.?

14 A. IT IS.

15 MS. MEW: DEFENDANT MOVES TO ADMIT DX57.

16 DR. KITCHENS: NO OBJECTIONS.

17 THE COURT: ADMITTED.

18 (DEFENSE EXHIBIT 57 IS ADMITTED INTO
19 EVIDENCE.)

20 BY MS. MEW:

21 Q. WE CAN TAKE THAT DOWN.

22 DR. ALLEN, ARE YOU FAMILIAR WITH A
23 DIAGNOSTIC FOR MOOD DISORDERS SUCH AS ANXIETY?

24 A. ABSOLUTELY.

25 Q. IS THERE A TREATISE OR OTHER WELL-RECOGNIZED

1 PUBLICATION THAT SETS FORTH THOSE DIAGNOSTIC CRITERIA?

2 A. YES. THE DIAGNOSTIC AND STATISTICAL MANUAL FIVE
3 PUBLISHED IN 2014. THERE IS A TEXT PROVISION WHICH
4 DOESN'T CHANGE THE CRITERIA THAT JUST CAME OUT LAST
5 YEAR. AND SO THOSE PUBLICATIONS SET OUT THE CRITERIA
6 THAT ALL OF US USE TO DETERMINE THESE DIAGNOSES. AND
7 BASICALLY ALL I CAN THINK OF IT IS AS A DICTIONARY. SO
8 WHEN SOMEBODY SAYS, FOR EXAMPLE, GENERALIZED ANXIETY
9 DISORDER, EVERYBODY KNOWS EXACTLY WHAT YOU ARE TALKING
10 ABOUT, THE SYMPTOMS YOU ARE TALKING ABOUT.

11 Q. AND ON THE TOPIC OF ANXIETY, IN YOUR WORK, DO
12 YOU REGULARLY EVALUATE AND TREAT PEOPLE WHO ARE
13 EXPERIENCING MENTAL DISORDERS?

14 A. YES, EVERY DAY.

15 Q. ARE YOU ALSO FAMILIAR WITH THE DIAGNOSTIC
16 CRITERIA FOR ADHD IN THE NATURE OF SYMPTOMS AND
17 IMPAIRMENT FROM ADHD?

18 A. I AM.

19 Q. HAVE YOU EVALUATED PATIENTS FOR ANXIETY?

20 A. YES, THAT'S ALMOST ON A DAILY BASIS.

21 Q. HAVE YOU EVALUATED PATIENTS FOR ADHD?

22 A. YES, IT COMES UP IN ALMOST EVERY WALK OF LIFE,
23 AND SO IT'S LESS COMMON THAN ANXIETY FOR SURE, BUT IT'S
24 SOMETHING THAT I DO REGULARLY.

25 Q. AS A PRACTICING PSYCHIATRIST, ARE YOU FAMILIAR

1 WITH MEDICATIONS THAT CAN BE PRESCRIBED FOR ANXIETY OR
2 ADHD?

3 A. YES, I PRESCRIBE THEM AND TEACH RESIDENTS ABOUT
4 THEM.

5 Q. IN YOUR WORK AS A FORENSIC PSYCHIATRIST, DO YOU
6 REGULARLY REVIEW MEDICAL RECORDS PREPARED BY OTHER
7 HEALTHCARE PROFESSIONALS?

8 A. YES, THAT'S A ROUTINE PROCESS WHENEVER I AM
9 DOING A FORENSIC EXAMINATION, THERE ARE ALMOST ALWAYS
10 RECORDS OF OTHER PROFESSIONALS, NOT PSYCHIATRISTS, BUT
11 FAMILY PRACTITIONERS, INTERNISTS, SURGEONS AND EVERY
12 SPECIALTY, SO THAT'S SOMETHING I DO ROUTINELY.

13 Q. AND ARE YOU ALSO FAMILIAR WITH PHYSICIAN
14 PRACTICES AROUND PRESCRIBING MEDICATION FOR ANXIETY AND
15 ADHD?

16 A. YES, ABSOLUTELY. NOT ONLY AM I FAMILIAR WITH
17 THOSE, I TEACH THEM.

18 Q. AND I THINK YOU REFERRED TO THIS, BUT DO YOU
19 ALSO REVIEW REQUESTS FROM INDIVIDUALS WHO ARE SEEKING
20 ACCOMMODATIONS ON STANDARDIZED TESTS AS AN OUTSIDE
21 REVIEWER?

22 A. I DO. I DO FOR SEVERAL DIFFERENT KINDS OF TEST
23 AGENCIES. I HAVE BEEN DOING SUCH REVIEWS FOR AT LEAST
24 15 YEARS.

25 Q. THROUGH THAT WORK, HAVE YOU BECOME FAMILIAR WITH

1 THE TYPE AND EXTENT OF RECORDS THAT INDIVIDUALS SEEKING
2 ACCOMMODATIONS HAVE SUBMITTED TO TESTING ENTITIES TO
3 SUPPORT REQUESTS FOR TESTING ACCOMMODATIONS?

4 A. YES, ROUTINELY.

5 MS. MEW: YOUR HONOR, NBME OFFERS DR.
6 ALLEN AS AN EXPERT IN ANXIETY AND ADHD, PRESCRIPTION
7 PRACTICES AROUND ANXIETY AND ADHD, PHYSICIAN PRACTICES
8 IN KEEPING MEDICAL RECORDS, AS WELL AS THE DOCUMENTATION
9 AND REVIEW OF ACCOMMODATION REQUESTS UNDER THE ADA.

10 THE COURT: DR. KITCHENS?

11 YOU ARE ON MUTE.

12 DR. KITCHENS: I WAS TRYING TO HEAR YOU
13 -- MAKE SURE I WAS THINKING CLEARLY.

14 YOU SAID THAT YOU WOULD LIKE TO HAVE HIM
15 AS AN EXPERT OF INTERPRETING THE ADA?

16 MS. MEW: THE DOCUMENTATION AND REVIEW OF
17 ACCOMMODATION REQUEST UNDER THE ADA. NOT AS A LAWYER,
18 BUT AS HIS PRACTICES AS A REVIEWER.

19 DR. KITCHENS: NO OBJECTION.

20 THE COURT: THE TESTIMONY WILL BE
21 ACCEPTED.

22 BY MS. MEW:

23 Q. DR. ALLEN, FROM A CLINICAL STANDPOINT, WHAT IS
24 ANXIETY?

25 A. WELL, ANXIETY IS A WORD THAT HAS A COUPLE OF

1 MEANINGS. THERE IS THE SYMPTOM OR MOOD OR EXPERIENCE OF
2 ANXIETY, WHICH IS A NORMAL RESPONSE TO STRESS THAT WE
3 ALL HAVE AT VARYING DEGREES OF THROUGH OUR LIVES. IT'S
4 AN ADAPTIVE MECHANISM WHERE FROM AN EVOLUTIONARY
5 STANDPOINT YOU LITERALLY NEED TO BE ANXIOUS TO INCREASE
6 YOUR PERFORMANCE, WHETHER IT BE IN A SPORTING EVENT OR
7 RUNNING FROM A BEAR, IF WE TALK TO ONE OF OUR ANCESTORS.

8 THEN THERE IS A CLINICAL DIAGNOSIS OF
9 ANXIETY, WHICH THERE IS A FEW DIFFERENT VERSIONS. BUT
10 GENERALIZED ANXIETY IS ONE OF THE MORE COMMON, WHERE YOU
11 HAVE THE SYMPTOM OF ANXIETY AS PART OF IT, BUT ALSO
12 THERE IS MORE TO IT THEN THAN. IT'S NOT JUST LIKE I
13 FEEL NERVOUS, THERE HAS TO BE A PERVASIVENESS AND A
14 SEVERITY OF THE SYMPTOM THAT IT CAUSES FUNCTIONAL
15 LIMITATION, IT PREVENTS YOU FROM DOING THE THINGS YOU
16 NEED TO DO ON A DAY-TO-DAY BASIS.

17 AND ONLY IF THOSE SYMPTOMS ARE THAT
18 SEVERE AND OCCUR MORE THAN JUST IN A BLUE MOON, THEY
19 HAVE TO BE PERVASIVE AND OCCUR COMMONLY. DOES IT RISE
20 TO THE LEVEL OF A MENTAL ILLNESS OR A CLINICAL DIAGNOSIS
21 OF ANXIETY.

22 Q. IN YOUR EXPERIENCE AND FROM YOUR REVIEW OF
23 THOUSANDS -- WELL, YOU TELL ME, MEDICAL RECORDS FROM
24 OTHER HEALTHCARE PROFESSIONALS, DO HEALTHCARE
25 PROFESSIONAL EVER TREAT PATIENTS FOR ANXIETY-TYPE

1 CONDITIONS THAT MAY NOT NECESSARILY RISE TO THE LEVEL OF
2 A CLINICAL DISORDER?

3 A. YES, I HAVE LITERALLY REVIEWED THOUSANDS OF
4 OTHER MEDICAL RECORDS FOR PEOPLE WITH MENTAL ILLNESS
5 FROM OTHER CLINICIANS. AND WHEN WE LOOK AT WHY
6 CLINICIANS ACT AND TREAT, WE ARE TREATING SYMPTOMS.
7 TYPICALLY WHEN SOMEBODY PRESENTS TO A CLINIC OF MINE AND
8 THEY ARE PRESENTING WITH SYMPTOMS THAT ARE DISTRESSING
9 IN SOME WAY, I WANT TO HELP ALLEVIATE THOSE SYMPTOMS.
10 AND VERY COMMONLY, IF THE ANXIETY OR DISTRESS IS
11 TEMPORARY, WE WILL TRY TO DO THAT THROUGH PSYCHOTHERAPY.
12 THAT MAY NOT BE AVAILABLE IN ALL CLINICIAN'S OFFICES.

13 IF IT RISES TO THE LEVEL OF SEVERITY AND
14 PERSUASIVENESS, I MAY CONSIDER MEDICATIONS. BUT WHAT I
15 SEE IN THE RECORDS IS THAT VERY COMMONLY WE ARE IN A
16 MEDICALIZED KIND OF SOCIETY NOW, MORE NOW THAN 20 YEARS
17 WHEN I STARTED PRACTICING, THAT MEDICATIONS ARE AN
18 EASIER TREATMENT FOR THE CLINICIAN, IT'S EASIER FOR THE
19 PATIENT, IT TAKES LESS TIME, IT'S BENEFICIAL IN MOST
20 PEOPLE, AND REALLY IMPORTANTLY, THE MEDICATIONS
21 GENERALLY HAVE VERY LOW SIDE EFFECTS AND VERY LOW RISK.

22 SO THE RISK BENEFIT RATIO OF THE
23 CLINICIAN IS, CAN I HELP WITH PRESCRIBING THE
24 MEDICATION? YES. IS THERE HARM? PROBABLY NOT.

25 SO WE DO SEE PEOPLE PRESCRIBED THINGS

1 LIKE SSRI'S AND ANTIDEPRESSANTS, OTHER ANXIETY MEDICINE
2 LIKE BUSPIRONE ROUTINELY WITHOUT MEETING ALL OF THE
3 CRITERIA FOR A CLINICAL DIAGNOSIS OF GENERALIZED ANXIETY
4 DISORDER OR PANIC DISORDER, ONE OR THE OTHER DSM
5 RECOGNIZED ILLNESSES.

6 Q. WE HAVE SEEN IN MEDICAL RECORDS REFERENCES TO
7 PHQ FORMS. WHAT IS A PHQ FORM?

8 A. SO THE PHQ IS -- AND TYPICALLY WE SEE THE PHQ9
9 THESE DAYS. AND THIS A -- IT'S A FREE QUESTIONNAIRE,
10 THAT IS IMPORTANT, THAT HAS BEEN ADOPTED BY ALMOST ALL
11 ELECTRONIC MEDICAL RECORDS PER COMPANIES AS A SCREENING
12 TOOL FOR DEPRESSION. AND IT ASKS NINE SIMPLE YES, NO
13 QUESTIONS THAT WILL ALERT THE CLINICIAN THAT MAYBE THIS
14 PERSON HAS DEPRESSION, YOU SHOULD LOOK FURTHER, IF THEY
15 ANSWER ENOUGH OF THE QUESTIONS IN THE POSITIVE MANNER.

16 SO IT IS A VERY BRIEF QUESTIONNAIRE, AND
17 IT'S AGAIN, A SCREENER, IT'S NOT DIAGNOSTIC, IT'S NOT BY
18 ITSELF SUFFICIENT, BY IT IS THE FIRST STEP IN AN
19 EVALUATION FOR DEPRESSION.

20 Q. WHAT IS A G-A-D OR GAD7 FORM.

21 A. SO THIS IS THE ANXIETY VERSION OF THE PHQ9, SO
22 IT'S SEVEN QUESTIONS, THAT'S WHY IT SAYS THAT. AND
23 AGAIN, IT'S A SCREENING TOOL THAT YOU GIVE OFTEN TO
24 EVERY NEW PATIENT THAT COMES INTO A CLINIC, AND
25 SOMETIMES EVERY PATIENT IN A MENTAL HEALTH CLINIC EVERY

1 TIME, JUST TO ALERT THE CLINICIAN, HEY, YOU MAY NEED TO
2 LOOK FURTHER. AND ELECTRONIC MEDICAL RECORDS NOW HAVE
3 SORT OF LIKE THIS ALERT SYSTEM WHERE THE PERSON, AS THEY
4 SIGN INTO THEIR TELEHEALTH VISIT, THEY HAVE TO FILL OUT
5 THESE QUESTIONS, AND THEN IT ALERTS THE CLINICIAN
6 IMMEDIATELY, HEY, LOOK INTO THIS MORE.

7 SO AGAIN, A SCREENING TOOL, NOT A
8 DIAGNOSTIC ONE.

9 Q. SO WITH ANXIETY, IS IT STATIC CONDITION?

10 A. NO, IT'S SOMETHING THAT LITERALLY CAN CHANGE
11 HOUR TO HOUR, SO DEPENDING ON YOUR CIRCUMSTANCES. AND
12 CERTAINLY IT CAN CHANGE FROM HOUR TO HOUR DEPENDING ON
13 THE CIRCUMSTANCES, IT COULD CHANGE MONTH TO MONTH,
14 DEPENDING ON YOUR MOOD AND OTHER LONG-TERM STRESSORS IN
15 YOUR LIFE. SO PATIENTS CAN HAVE SEVERE ANXIETY FOR A
16 DAY OR A WEEK AND THEN NEVER HAVE IT AGAIN. AND THAT'S
17 NOT NECESSARILY INDICATIVE OF NEEDING LONG-TERM
18 MEDICATIONS WHEREAS IF YOU HAVE IT PERSUASIVELY, IT
19 LASTS FOR WEEKS OR MONTHS, THAT'S WHEN YOU START
20 THINKING OF MENTAL ILLNESS AS A POSSIBILITY.

21 Q. DOES THE ANXIETY EFFECT READING SKILLS?

22 A. GENERALLY, NO. READING IS ONE OF THE MOST
23 FUNDAMENTAL OVERLEARNED SKILLS WE HAVE. TO GIVE YOU AN
24 EXAMPLE, I DO A LOT OF TRAUMATIC BRAIN INJURY
25 EVALUATIONS. READING IS ONE OF THOSE THINGS THAT IS NOT

1 EFFECTED EVEN BY TRAUMATIC BRAIN INJURY, TYPICALLY, AND
2 WE USE IT AS A BASELINE.

3 THE ABILITY TO READ IS SO DIFFUSELY
4 STORED IN THE BRAIN, IT'S A SKILL THAT IS SO OVERLEARNED
5 THAT IT'S NOT ONE THAT IS AMENABLE OR EFFECTED BY SLIGHT
6 CHANGES IN YOUR MOOD OR YOUR COGNITION. AS A RESULT,
7 IT'S GENERALLY VERY STABLE THROUGH THE LIFETIME AND
8 REGARDLESS OF PSYCHIATRIC OR COGNITIVE DIAGNOSIS.

9 Q. ONE LAST GENERAL QUESTION.

10 IS TEST ANXIETY A DIAGNOSIS RECOGNIZED IN
11 THE DSM?

12 A. IT IS NOT A DIAGNOSIS IN THE DSM, IT IS NOT --
13 IT DOES NOT HAVE IT'S OWN CATEGORY, IT'S NOT REALLY EVEN
14 MENTIONED IN THE BOOK. THERE ARE SOME CLINICIANS WHICH
15 HAVE TRIED TO ATTACH IT TO SPECIFIC PHOBIAS OR
16 PERFORMANCE ANXIETY, BUT IT IS NOT SPECIFICALLY
17 DESCRIBED IN THE DSM THAT WAY. AND THERE IS NOT GOOD
18 RESEARCH TO SUPPORT IT AS A STANDALONE PSYCHIATRIC
19 ILLNESS.

20 Q. I WANT TO SHIFT OVER, DR. ALLEN, TO DR.
21 KITCHENS'S REQUEST FOR TESTING ACCOMMODATIONS TO THE
22 NBME FOR THE STEP 1 EXAM IN 2022.

23 AS SORT OF A BASELINE QUESTION, FOR
24 SOMEONE WHO IS REQUESTING TESTING ACCOMMODATIONS, WHAT
25 ARE YOU LOOKING FOR IN THEIR RECORDS?

1 A. WHAT I AM LOOKING FOR, FIRST OF ALL, A DIAGNOSIS
2 OF MENTAL ILLNESS; I AM LOOKING FOR A LONGEVITY OF
3 SYMPTOMS; I AM LOOKING FOR DESCRIPTION OF THE ACTUAL
4 SYMPTOM BURDEN, NOT JUST A TITLE OR A DIAGNOSIS CODE; I
5 AM LOOKING FOR EVIDENCE IN THE RECORD OR A PERSONAL
6 STATEMENT ABOUT HOW THOSE SPECIFIC SYMPTOMS THAT ARE
7 DESCRIBED IN THE MEDICAL RECORD DIRECTLY IMPACT ACADEMIC
8 FUNCTION OR MORE IMPORTANTLY, TESTING ABILITY.

9 AND DEPENDING ON THE DIAGNOSIS AND
10 CONDITION, IF IT'S A CONDITION THAT TYPICALLY DOES NOT
11 CAUSE SIGNIFICANT READING IMPAIRMENT, THAT SORT OF
12 THING, I AM LOOKING FOR OBJECTIVE MEASURES OF COGNITIVE
13 IMPAIRMENT OR ACADEMIC DIFFICULTIES THAT WOULD INDICATE
14 THAT THEY ARE SUBSTANTIALLY LIMITED COMPARED TO THE
15 GENERAL POPULATION.

16 Q. I AM GOING TO PULL UP EXHIBIT PX2.

17 I WILL REPRESENT TO YOU THAT THIS IS A
18 REQUEST FOR ACCOMMODATIONS THAT PLAINTIFF, MARKCUS
19 KITCHENS, SUBMITTED TO NBME IN JANUARY OF 2022. AND IF
20 YOU LOOK AT PAGE FOUR, WHERE DR. KITCHENS LISTS HIS
21 IMPAIRMENTS.

22 MS. MEW: CAN YOU SEE THIS, DR. KITCHENS?

23 DR. KITCHENS: (DR. KITCHENS SHAKES HEAD
24 IN THE AFFIRMATIVE.)

25 BY MS. MEW:

1 Q. AND HERE AGAIN, I SEE THE REFERENCE TO TEST
2 ANXIETY.

3 AND AGAIN, IS THIS A RECOGNIZED MENTAL
4 DISORDER?

5 A. NO, THAT DIAGNOSIS CODE APPLIES TO UNSPECIFIED
6 ANXIETY. DIAGNOSTIC CODES ARE NECESSARY FOR BILLING TO
7 SHOW WHY YOU ARE SEEING A PATIENT. YOU HAVE TO PUT THEM
8 INTO EVERY ELECTRONIC MEDICAL RECORD, SO THEY HAD TO PUT
9 IN SOMETHING. AND THEY CHOSE THIS UNSPECIFIED ANXIETY,
10 WHICH IS NOT REALLY A DIAGNOSIS UNDER DSM, IT'S SORT OF
11 A CATCHALL, THERE IS SOME ANXIETY HERE, AND I DON'T KNOW
12 WHAT ELSE TO CALL IT.

13 BUT AGAIN, IT'S NOT -- THAT CODE DOES NOT
14 EQUAL TEST ANXIETY, IF YOU LOOK IT UP UNDER THE ICD-10
15 CODE.

16 Q. IF YOU LOOK AT THE DIAGNOSTIC CODE F90.9 FOR
17 ADHD, WHAT IS DIAGNOSTIC CODE 90.9?

18 A. SO THIS IS ANOTHER UNSPECIFIED CODE, IT'S
19 UNSPECIFIED ADHD, WHICH MEANS TYPICALLY WHEN YOU LEAVE A
20 CODE UNSPECIFIED, IT MEANS YOU HAVE NOT DONE A FULL
21 EVALUATION, YOU HAVE NOT DRILLED DOWN ON THE SPECIFICITY
22 OF THE TYPE OF ATTENTION PROBLEMS YOU ARE SEEING. SO
23 BOTH OF THESE END UP BEING UNSPECIFIED, SORT OF, ALMOST
24 LIKE I AM CONSIDERING THIS, BUT I HAVE NOT GOTTEN DOWN
25 TO THE SPECIFICITY THAT IS AVAILABLE IN THE DSM.

1 Q. IF YOU LOOK IN THE MIDDLE OF THE PAGE AT SECTION
2 D2, THE PERSONAL STATEMENT.

3 A. YES.

4 Q. IS THIS TYPE OF INFORMATION SOMETHING YOU FIND
5 HELPFUL AS AN EXTERNAL REVIEWER?

6 A. ABSOLUTELY. SO I NEED A PERSONAL STATEMENT THAT
7 EXPLAINS EXACTLY HOW THE DIAGNOSIS AND THE SYMPTOMS
8 DIRECTLY IMPACT THE TESTING ABILITY. BECAUSE, I MEAN,
9 THAT'S THE INTERNAL EXPERIENCE OF THE APPLICANT. I NEED
10 TO UNDERSTAND -- JUST MAKING BROAD STATEMENTS ABOUT, I
11 HAVE A DIAGNOSIS, THEREFORE I MUST BE DISABLED, IS --
12 DOES NOT PROVIDE ENOUGH INFORMATION. BECAUSE DIAGNOSES
13 ARE BROAD, THERE ARE PEOPLE WITH MILD SYMPTOMS AND
14 SEVERE SYMPTOMS; THERE ARE PEOPLE WHO HAVE VARIOUS TYPES
15 SYMPTOMS OF ANXIETY THAT AFFECT MAYBE THEIR
16 DISTRACTABILITY VERSUS THEIR FEAR OF BEING IN A CROWD
17 VERSUS -- THERE ARE SO MANY PARTICULAR SYMPTOMS, SO THE
18 SPECIFICS OF THE INDIVIDUAL IS VERY IMPORTANT, AND
19 TYPICALLY THE WAY WE GET THIS, AT LEAST MOST CLEARLY, IS
20 THROUGH THE PERSON'S STATEMENT.

21 Q. IF WE TURN TO DR. KITCHENS'S PERSONAL STATEMENT.

22 WHEN YOU REVIEWED HIS PERSONAL STATEMENT,
23 WHAT DID IT TELL YOU ABOUT HIS CLAIMED ANXIETY -- WE ARE
24 GOING TO FOCUS ON ANXIETY FOR MUCH OF WHAT YOU ARE
25 TESTIFYING TO -- ABOUT HIS CLAIMED ANXIETY DISORDER AND

1 FUNCTIONAL LIMITATIONS?

2 A. WELL, IT MENTIONS A DIAGNOSIS, SEVERE TEST
3 ANXIETY, WHICH WE TALKED ABOUT. AND THEN IT MENTIONS
4 THAT HE FEELS THAT HE NEEDS -- THAT ADDITIONAL TIME
5 WOULD DECREASE HIS ANXIETY AND INCREASE HIS FOCUS.

6 THAT'S ESSENTIALLY ALL THIS LETTER
7 DESCRIBES. IT DOES NOT TELL ME WHAT THE ANXIETY LEADS
8 TO; WHAT THE SYMPTOMS ARE WHILE TAKING A TEST; WHAT HIS
9 HISTORY HAS BEEN IN TAKING PRIOR TESTS; AND HOW IT
10 DIRECTLY IS CAUSED HIM OR IMPACTED HIS TEST TAKING
11 ABILITY IN THE PAST. NONE OF THAT IS AVAILABLE. THERE
12 IS ESSENTIALLY NO CLINICAL INFORMATION HERE TO EXPLAIN
13 THE CONNECTION BETWEEN DIAGNOSIS AND DISABILITY.

14 Q. JUST SO THE RECORD IS CLEAR, I THINK HE REFERRED
15 TO HIS DIAGNOSIS OF SEVERE TEST ANXIETY.

16 DO YOU MEAN, LIKE, THAT THAT WAS HIS
17 PREFERRED DIAGNOSIS?

18 A. YES, THAT IS WHAT HE IS CLAIMING, THAT'S WHAT WE
19 JUST SAW IN THE PRIOR FORM HE HAS WRITTEN IN. THAT'S
20 CLAIMED AS A DIAGNOSIS, WHICH AS WE KIND OF ALREADY
21 SAID, REALLY IS NOT A DIAGNOSIS, IT'S A SYMPTOM THAT HE
22 IS REPORTING.

23 Q. AND LET ME ASK YOU, YOU WERE TALKING A LOT ABOUT
24 SORT OF THE IMPACT ON TESTING. IN LOOKING AT SORT OF
25 THE TESTING ACCOMMODATION REQUEST, WHEN YOU ARE ALSO

1 LOOKING JUST FOR THE ANXIETY DISORDER GENERALLY, ARE YOU
2 ONLY LOOKING FOR IMPAIRMENT IN THE TESTING REALM?

3 A. WELL, NO. BECAUSE I MEAN, IF YOU HAVE AN
4 ANXIETY DISORDER, AND LET'S SAY, YOU KNOW, GENERALIZED
5 ANXIETY DISORDER, AGAIN BEING A GOOD EXAMPLE, YOU WILL
6 HAVE IMPAIRMENT THROUGHOUT YOUR FUNCTIONING. SO YOUR
7 TREATMENT RECORD SHOULD SHOW SOCIAL ANXIETY, DIFFICULTY
8 IN CROWDS, DIFFICULTY WITH MEETING NEW PEOPLE, AND JUST
9 ALL OF THE OTHER AREAS OF ANXIETY THAT WE TYPICALLY SEE.

10 SO THOSE ARE VERY COMMON IN THE
11 APPLICATIONS THAT I REVIEW WHERE THERE IS A DESCRIPTION
12 IN THEIR TREATMENT RECORDS OF, THIS IS PERVASIVE PROBLEM
13 THAT EFFECTS ALL OF THEIR AREAS OF LIFE, AND TESTING IS
14 A PART OF IT.

15 SO I AM LOOKING FOR THIS BROAD
16 EXPLANATION OF HOW THIS DIAGNOSIS OCCURS, HOW IT'S
17 EFFECTING THEM AND THEN ULTIMATELY WHAT THE TREATMENT
18 COURSE HAS BEEN.

19 SO I DON'T WANT JUST -- I TALKED ABOUT
20 THE TEST IMPACT, THAT'S IMPORTANT, BUT I REALLY NEED TO
21 SEE THE WHOLE PERSPECTIVE TO UNDERSTAND WHETHER THIS IS
22 A REAL PSYCHIATRIC ILLNESS THAT IS, AGAIN, PERVASIVE AND
23 CAUSING FUNCTIONAL LIMITATION IN ALL AREAS OF LIFE.

24 Q. LET'S TURN TO THE NEXT PAGE. THIS IS A
25 APRIL 22, 2022 LETTER FROM GORY KHAN.

1 FIRST OF ALL, DOES THIS LETTER TO YOU
2 INDICATE A DIAGNOSE?

3 A. IT DOES NOT. IT DESCRIBES A SYMPTOM OF ANXIETY,
4 A SIGNIFICANT AMOUNT, WHICH IS NOT -- I DON'T KNOW HOW
5 TO QUALIFY THAT. USUALLY IN MENTAL ILLNESS WE TALK
6 ABOUT, MILD, MODERATE, SEVERE. THE DSM SORT OF RATES
7 ILLNESS IN THAT MANNER.

8 SO I DON'T REALLY KNOW WHAT SIGNIFICANT
9 ANXIETY MEANS, AND IT DOES NOT TELL ME ANYTHING ABOUT
10 THE ACTUAL SYMPTOMS HE EXPERIENCES OTHER THAN THAT AND
11 HOW THAT IMPACTS HIM AND GIVES NO DIAGNOSE.

12 Q. DOES THIS LETTER SUPPORT -- WOULD IT SUPPORT A
13 REQUEST FOR 100 PERCENT EXTRA TESTING TIME AS A
14 DISABILITY-BASED TESTING ACCOMMODATION?

15 A. I DON'T BELIEVE SO. A COUPLE OF THINGS, ONE IS
16 IT DOES NOT DESCRIBE ANYTHING ABOUT HIS FUNCTIONAL
17 LIMITATION FOR ANY ACCOMMODATION, LET ALONE 100 PERCENT
18 EXTRA TIME, WHICH ACADEMIC RESEARCH WOULD SORT OF
19 SUGGEST IT IS SORT OF AN EXTRAORDINARY ACCOMMODATION.
20 EVEN MOST PEOPLE WITH DISABILITIES DO NOT REQUIRE THAT
21 OR DO NOT -- AND SO THERE IS ALMOST LIKE TWO STEPS
22 REMOVED FROM WHAT THIS WOULD NEED TO PROVIDE, AND IT
23 DOES NOT.

24 Q. WHAT ABOUT THE TIMING OF THE LETTER. IF I TOLD
25 YOU, AGAIN, THAT DR. KITCHENS'S REQUEST WAS SUBMITTED IN

1 JANUARY OF 2022.

2 A. RIGHT. SO THIS IS 18 MONTHS, ALMOST, OR A
3 LITTLE MORE THAN THAT BEFORE JANUARY 2022, I AM TAKING
4 THAT AS THE SUBMISSION DATE. SO ANXIETY, AS WE TALKED
5 ABOUT EARLIER BEING A FLUID SYMPTOM, DEPENDING ON YOUR
6 CIRCUMSTANCES AND HORMONAL CHANGES AND BIOCHEMICAL
7 ALTERATIONS AND ALL OF THESE OTHER THINGS THAT CHANGE
8 OVER THE LIFE COURSE. 18 MONTHS AGO SAYING HE HAD
9 SIGNIFICANT ANXIETY IS NOT INDICATIVE TO ME THAT HE HAS
10 FUNCTIONAL IMPAIRMENT IN JANUARY 2022.

11 Q. CAN WE TURN TO THE NEXT PAGE. THIS IS PAGE 9 OF
12 AN OCTOBER 5, 2020 OFFICE VISIT IN NORTHWEST MEDICINE
13 DERMATOLOGY.

14 DOES THIS LETTER SUPPORT DR. KITCHENS'S
15 REQUEST FOR 100 PERCENT TESTING TIME AS A
16 DISABILITY-BASED TESTING ACCOMMODATION?

17 A. I DO NOT BELIEVE IT DOES. IT DOES NOT PROVIDE
18 ANY SYMPTOMS RELATED TO THIS DIAGNOSIS, AND IT LISTS A
19 PAST DIAGNOSIS OF ADHD, SO THIS CLINICIAN IS NOT REALLY
20 EVEN ADDRESSING IT. SO THIS IS A DERMATOLOGY CLINIC.
21 AND SO THERE IS NO DESCRIPTION OF NOT ONLY SYMPTOMS
22 RELATED TO ADHD, BUT FUNCTIONAL LIMITATION AS A RESULT.
23 SO THIS DOES NOT SUPPORT THAT DIAGNOSE.

24 Q. LET'S SCROLL DOWN.

25 DO YOU SEE THE REFERENCE TO CURRENT

1 OUTPATIENT MEDICATIONS?

2 A. YES.

3 Q. CAN YOU TELL ME WHAT IS BUSPIRONE?

4 A. SO BUSPIRONE, THE BRAND NAME IS BUSPAR, IS AN
5 ANXIETY MEDICATION THAT IS A SEROTONIN MODULATING
6 MEDICATION. IT IS A FIRST-LINE TREATMENT FOR ANXIETY
7 BECAUSE IT HAS REMARKABLY LOW SIDE EFFECTS. IT SORT OF
8 HAS -- IT'S VERY, VERY SAFE, AND SO IT'S OFTEN A FIRST
9 CHOICE BECAUSE OF THAT.

10 IT'S A MEDICATION YOU HAVE TO TAKE EVERY
11 DAY FOR IT TO BE EFFECTIVE, IT BUILDS UP IN YOUR SYSTEM.
12 IT DOES REDUCE ANXIETY IN GENERAL, BUT AGAIN, IT IS
13 PRESCRIBED FAIRLY GENEROUSLY BECAUSE IT IS SO SAFE AND
14 INEXPENSIVE AND BEEN AROUND FOR A LONG TIME, BUT THAT'S
15 THE PURPOSE.

16 Q. DID YOU JUST SAY THAT IT HAS TO BE TAKEN EVERY
17 DAY TO BE EFFECTIVE?

18 A. IT DOES. AND THIS DOES SAY IT'S TAKEN TWO TIMES
19 AS NEEDED DAILY, AS NEEDED, WHICH IS NOT A PROPER
20 PRESCRIPTION FOR BUSPIRONE. IF IT'S TAKEN ONLY AS
21 NEEDED, IT'S NOT EFFECTIVE. JUST LIKE ANTIDEPRESSANTS
22 LIKE ZOLOFT, PROZAC, PAXIL THAT HAVE TO BE TAKEN EVERY
23 DAY. BUSPIRONE IS THE SAME. IT DOES NOT HAVE IMMEDIATE
24 EFFECT AND MUST BUILD IN YOUR SYSTEM AND IF YOU TAKING
25 IT ONLY OCCASIONALLY, IT HAS ESSENTIALLY NO CLINICAL

1 BENEFIT AT ALL.

2 Q. WHAT IS THE -- THERE IS THE REFERENCE TO
3 DEXTROAMPHETAMINE-AMPHETAMINE. WHAT IS THAT?

4 A. SO THE BRAND NAME IS ADDERALL, SO THIS IS CALLED
5 A MIXTURE OF AMPHETAMINE SALTS. IT'S A STIMULANT
6 MEDICATION USED FOR ADHD, AND THESE MEDICATIONS ARE
7 PRESCRIBED FOR COMPLAINTS OF CONCENTRATION AND FOCUS
8 DEFICITS. AND IT'S A STANDARD TREATMENT FOR THAT
9 MEDICATION -- OR FOR THAT CONDITION.

10 BUT AGAIN, THIS RECORD DOES NOT TELL US
11 ANYTHING ABOUT THE CURRENT SYMPTOMS.

12 Q. LET'S LOOK TO THE NEXT TWO PAGES. AND I AM
13 TRYING TO -- THESE I WILL REPRESENT TO YOU -- OR TWO
14 PAGES. CAN WE LOOK AT THE FOOTER, FROM A MAY 25, 2018
15 RECORD. AND MAYBE WE CAN JUST SCROLL OUT A LITTLE BIT.

16 MS. MEW: AND DR. KITCHENS, JUST LET ME
17 KNOW IF YOU WANT US TO SCROLL THROUGH. I THINK WE HAVE
18 LOOKED THROUGH THIS, I WANT TO GET THE WHOLE PAGE ON THE
19 SCREEN.

20 BY MS. MEW:

21 Q. SO DO THESE TWO PAGES SHOW THAT DR. HACKMAN
22 DIAGNOSED DR. KITCHENS WITH ADHD HERE IN MAY 2018?

23 A. WELL, IT SHOWS THAT ADHD UNSPECIFIED TYPE, WHICH
24 AGAIN IS THAT KIND OF BROADER TERM, HAS BEEN DIAGNOSED.
25 IT'S NOT CLEAR WHETHER IT'S AN ACTIVE DIAGNOSIS BY HER

1 AT THIS TIME OR SOMETHING THAT SHE HAS BEEN TOLD ABOUT.
2 BUT, OF COURSE, IT DOES SAY THAT SHE HAS REFERRED TO
3 MENTAL HEALTH COUNSELOR TO EVALUATE AND TREAT,
4 INDICATING THAT HER ABILITY AND DESIRE TO DIAGNOSIS THAT
5 -- THIS IS NOT IN HER WHEELHOUSE AND SHE WANTS TO REFER
6 IT OUT. AND WE SEE RECORDS LATER FROM HER THAT SHOWS --
7 THIS IS NOT MORE EXPLICIT, BUT WE KNOW EVEN AT THIS TIME
8 SHE IS EVALUATING FOR MENTAL HEALTH ASSESSMENT. AND SHE
9 ALSO DIAGNOSES HIS ANXIETY, THIS UNSPECIFIED ANXIETY,
10 BUT AGAIN WITHOUT ANY DESCRIPTION OF SYMPTOMS.

11 Q. WE WILL LOOK AT THE NEXT TWO PAGES. AND WE ARE
12 ACTUALLY GOING BACK IN TIME WITH DR. HACKMAN, SO THIS IS
13 NOW JULY -- GOING BACK TO JULY 2017. IF WE CAN LOOK AT
14 THOSE. GO TO THE NEXT PAGE.

15 DO THESE TWO PAGES SHOW THAT DR. HACKMAN
16 DIAGNOSED DR. KITCHENS WITH -- HOLD ON A MINUTE -- ADHD?

17 A. CAN WE GO TO THE SECOND PAGE?

18 Q. CAN WE GO TO THE SECOND PAGE?

19 A. THERE WE GO, RIGHT.

20 SO AGAIN, THERE IS A DIAGNOSIS LISTED OF
21 ADHD. NOW THAT CODE OF R 41840 IS BASICALLY -- IT'S A
22 BROAD DIAGNOSIS OF -- AS IT SAYS, ATTENTION AND
23 CONCENTRATION DEFICIT, IT'S NOT THE DIAGNOSIS OF ADHD.
24 SO SHE IS PUTTING IN KIND OF A VAGUER CODE, A BROADER
25 BROADER CODE TO SAY HE IS COMPLAINING OF THESE SYMPTOMS,

1 BUT SHE SPECIFICALLY STATES THAT SHE DOES NOT FEEL
2 COMFORTABLE PRESCRIBING ADDERALL FOR THAT CONDITION.
3 AND ULTIMATELY, SHE IS SORT OF ACKNOWLEDGING HIS
4 COMPLAINTS, BUT NOT MAKING A FORMAL DIAGNOSIS OF ADHD.

5 Q. DO THESE TWO PAGES SHOW THAT DR. HACKMAN
6 DIAGNOSED DR. KITCHENS WITH ANXIETY?

7 A. THESE TWO PAGES DO NOT.

8 Q. AND IF YOU LOOK BACK TO THE PRIOR PAGE AND THE
9 HISTORY AND PRESENT ILLNESS, TAKING THE RECORD AS A
10 WHOLE, EVEN IF THERE WAS A DIAGNOSIS HERE, AND YOU HAVE
11 TESTIFIED THERE IS NOT. BUT DO THESE TWO PAGES PROVIDE
12 ANY INFORMATION ABOUT DR. KITCHENS'S LEVEL OF IMPAIRMENT
13 OR FUNCTIONAL LIMITATION?

14 A. IT SAYS NOTHING ABOUT THAT. IT SAYS HIS
15 SUBJECTIVE REPORT OF FOCUSING BETTER ON ADDERALL, BUT WE
16 KNOW FROM RESEARCH ON STIMULANTS THAT PEOPLE
17 SUBJECTIVELY FEEL BETTER ON THOSE MEDICATIONS, BUT IT
18 DOES NOT NECESSARILY MEAN THAT THEY ARE IMPAIRED OR THAT
19 THEY HAD ACTUAL IMPROVEMENT ON COGNITIVE TESTING. SO
20 THAT IS NOT SUFFICIENT TO SHOW FUNCTIONAL LIMITATION.

21 Q. IF WE CAN GO BACK FOR JUST A MINUTE TO THE MAY
22 2018, AND TO GO THE FIRST PAGE. IS THIS THE FIRST PAGE?
23 OKAY.

24 IS THERE ANY -- I JUST WANT TO MAKE SURE
25 FOR COMPLETENESS. IS THERE ANYTHING IN THIS RECORD THAT

1 SPEAKS TO FUNCTIONAL IMPAIRMENTS?

2 A. NOTHING.

3 Q. LET'S GO NOW TO THE PROMETRIC PAGE.

4 FOR THE RECORD, WE ARE ON THE PAGE WITH
5 THE OCTOBER 27, 2020 E-MAIL FROM PROMETRIC. AND IF WE
6 ZOOM IN JUST A LITTLE BIT HERE TO THE MIDDLE OF THE
7 PAGE.

8 WHAT DOES THAT RECORD TELL YOU?

9 A. SO IT TELLS ME THAT ON THE COMPREHENSIVE BASIC
10 SCIENCE EXAM HE WAS PROVIDED EXTRA TIME.

11 Q. AND THEN WE WILL TURN TO PX52.

12 AND THIS IS THE CVS SCORE REPORT FROM
13 DECEMBER 10, 2020 THAT CORRELATES WITH THAT EXTENDED
14 TIME RECORD.

15 LOOKING AT THIS DOCUMENT, WHAT DOES THIS
16 RECORD TELL YOU?

17 A. WELL, IT SHOWS ME THAT THE RESULTS OF THIS EXAM
18 WERE FAR BELOW PASSING, BELOW THE LOWEST BAR OF OTHER
19 APPLICANTS, SO IT'S A LOW SCORE.

20 Q. REFLECTING ON ALL OF THE DOCUMENTATION THAT DR.
21 KITCHENS SUBMITTED IN SUPPORT OF HIS REQUEST FOR
22 ACCOMMODATIONS IN 2022, WHICH WE HAVE JUST DISCUSSED
23 HERE IN EXHIBIT DX2, DOES THAT INFORMATION DEMONSTRATE A
24 SUBSTANTIAL LIMITATION IN ANY MAJOR LIFE ACTIVITY
25 RELEVANT TO TAKING THE USMLE AS COMPARED TO MOST PEOPLE?

1 A. I DON'T BELIEVE IT DOES.

2 Q. DID THE DOCUMENTATION SUPPORT DR. KITCHENS'S
3 REQUEST FOR 100 PERCENT EXTRA TESTING TIME TO ACCESS THE
4 STEP 1 EXAM?

5 A. NO.

6 Q. I WANT TO LOOK NOW AT SOME ADDITIONAL DOCUMENTS
7 THAT HAVE BEEN ENTERED AS EVIDENCE AT THIS TRIAL, AND WE
8 ARE FOCUSED PRIMARILY ON ANXIETY. WE WILL PULL UP
9 EXHIBIT PX6. YOU CAN COME OUT A LITTLE BIT.

10 OKAY. THIS IS JANUARY 11, 2013 RECORD
11 FROM BEREA COLLEGE HEALTH SERVICES. IF WE SCROLL DOWN
12 HERE, GET PAST THE INTAKE CHART, AND SEE IF WE CAN GET
13 THE REST ON THE SCREEN. SCROLL ONE LITTLE BIT. OKAY.

14 MS. MEW: CAN YOU SEE THIS OKAY, DR.
15 KITCHENS?

16 DR. KITCHENS: (DR. KITCHENS SHAKES HIS
17 HEAD IN THE AFFIRMATIVE.)
18 BY MS. MEW:

19 Q. DOES THIS RECORD SHOW ANYTHING RELEVANT TO
20 ANXIETY?

21 A. IT DOES NOT.

22 Q. THAT WAS A LOT OF FORMATTING FOR A SHORT
23 QUESTION, SORRY, WE WILL GO ON TO PX9.

24 DOES ANYTHING IN THIS RECORD FROM
25 AUGUST 5, 2013 FROM BEREA COLLEGE HEALTH SERVICES, DOES

1 THIS SHOW ANYTHING REGARDING ANXIETY?

2 A. IT DOES NOT.

3 Q. LET'S PULL UP EXHIBIT DX12. THIS IS A SEPTEMBER
4 5, 2013 RECORD FROM BEREA COLLEGE HEALTH SERVICES.

5 DOES THIS DOCUMENT SAY ANYTHING ABOUT
6 ANXIETY?

7 A. NO.

8 Q. NOW LET'S TURN TO EXHIBIT DX7, AND WE WILL GO TO
9 THE PAGE BATES NUMBERED MK24. GO UP ONE, PLEASE. VERY
10 GOOD, THANK YOU.

11 THIS IS A JULY 8, 2014 RECORD FROM WHITE
12 HOUSE CLINICS. WE WILL JUST KIND OF SCROLL DOWN HERE A
13 LITTLE AND GIVE YOU A CHANCE TO MAKE SURE EVERYONE HAS
14 SEEN IT. LET'S GO BACK UP TO 24.

15 THERE UNDER THE NEUROPSYCHIATRIC
16 CATEGORY, WHAT DOES IT STATE?

17 A. IT SAYS NEGATIVE FOR ANXIETY AND DEPRESSION.

18 Q. IS THERE ANYTHING ELSE IN THIS RECORD THAT TELLS
19 YOU ANYTHING ABOUT ANXIETY?

20 A. UNDER -- RIGHT THERE IN THE MIDDLE OF THIS PAGE,
21 PSYCHIATRIC PHYSICAL EXAM, IT SAY, PATIENT DEMONSTRATES
22 APPROPRIATE MOOD AND AFFECT, SO HE IS NOT JUMPY, HE IS
23 NOT FIGGITY, SO THIS IS CONSISTENT WITH THE PRIOR
24 STATEMENT.

25 Q. LET'S GO TO THE PAGE BATES NUMBERED MK19, IN

1 DX7. THIS IS A FEBRUARY 15, 2016 RECORD FROM WHITE
2 HOUSE CLINICS.

3 IS THERE ANYTHING ABOUT ANXIETY IN THE
4 HISTORY OF PRESENT ILLNESS?

5 A. NO.

6 Q. SCROLL DOWN.

7 AND HERE FOR THE PHYSICAL EXAM, IS THERE
8 ANYTHING ABOUT ANXIETY THERE?

9 A. NO. AGAIN, APPROPRIATE MOOD AND AFFECT, NO
10 EVIDENCE OF ANXIETY.

11 Q. AND IF WE LOOK DOWN FURTHER, IS THERE ANYTHING
12 ELSE IN THIS DOCUMENT RELATIVE TO ANXIETY?

13 A. THERE IS NOT.

14 Q. WE CAN NOW GO TO PAGE MK16 IN DX7. SO THIS IS
15 THE JULY 26, 2017 RECORD FROM WHITE HOUSE CLINICS. IT
16 WAS -- PART OF IT WAS IN THE 2022 ACCOMMODATION REQUEST.

17 BUT JUST FOR COMPLETENESS, IS THERE
18 ANYTHING IN THE COMPLETE RECORD THAT TELLS YOU ANYTHING
19 RELEVANT TO ANXIETY?

20 A. YOU SCROLLED THROUGH IT ALL. THERE IS NOTHING
21 IN THERE RELATED TO ANXIETY.

22 Q. IF WE NOW GO TO PAGE MK12 IN DX7. AND A MORE
23 COMPLETE RECORD FROM THAT MAY 25, 2018 VISIT. LET'S
24 SCROLL DOWN HERE TO THE HISTORY OF PRESENT ILLNESS.

25 A. YES, WE ARE STARTING TO SEE ACTUALLY SOME

1 DESCRIPTION OF ANXIETY, STRESS SYMPTOMS, TALKS ABOUT
2 STRESS LEVEL PEAKING, MAKING HIMSELF SICK, EPISODES OF
3 VOMITING, BUT THAT WAS ACTUALLY A SHORT-TERM THING FROM
4 A GI BUG IT SOUNDS LIKE. BUT THAT'S REALLY IT. THAT'S
5 THE EXTENT OF ANY PSYCHIATRIC SYMPTOMS RELATED TO
6 ANXIETY.

7 Q. AND IF WE LOOK DOWN, AGAIN FOR COMPLETENESS,
8 IT'S THE ASSESSMENT PLAN.

9 A. SO YES, IN THE ASSESSMENT SECTION THERE IS THE
10 NOTATION OF ANXIETY, AGAIN, IT'S THAT'S UNSPECIFIED.
11 THERE IS NO TREATMENT FOR THAT, AND THERE IS DISCUSSION
12 OF REFERRAL FOR A NEED FOR AN EMOTIONAL SERVICE DOG, SO
13 SHE IS REFERRING HIM TO A MENTAL HEALTH COUNSELOR TO
14 ASSESS THAT IN MORE DEPTH.

15 Q. AND NOW WE WILL MOVE TO SOME MORE RECENT RECORDS
16 THAT HAVE BEEN INTRODUCED INTO EVIDENCE. I WILL PULL UP
17 PX19. THIS IS A MARCH 23, 2023 AFTER VISIT SUMMARY WITH
18 INSTRUCTIONS FROM DR. YIN.

19 WHAT IS THIS RECORD SHOWING HERE AT THE
20 TOP?

21 A. THIS SHOWS ME THAT THERE IS A MEDICATION CHANGE
22 IN THIS VISIT WITH DR. YIN FOR -- IN THE PRIMARY CARE
23 CLINIC, THAT HE STOPPED BUSPIRONE, WHICH WE TALKED ABOUT
24 EARLIER BEING A SEROTONIN DRUG THAT YOU TAKE EVERY DAY
25 TO PREVENT ANXIETY. AND DR. YIN HAS CHANGED HIM TO

1 PROPRANOLOL, WHICH IS AN OLD BLOOD PRESSURE MEDICINE
2 THAT WE USE SOMETIMES FOR EPISODIC ANXIETY. THIS IS
3 SOMETHING YOU CAN TAKE AS NEEDED, AND IT HELPS BREAK THE
4 CYCLE BETWEEN YOUR SUBJECTIVE PERCEPTION OF BEING
5 ANXIOUS AND THE PHYSICAL SYMPTOMS OF ANXIETY, LIKE
6 INCREASED HEART RATE, SWEATING, SHORTNESS OF BREATH,
7 THOSE KIND OF THINGS PROPRANOLOL BREAKS THAT CYCLE, AND
8 IT ALSO JUST HAS A CALMING EFFECT OVERALL.

9 SO DR. YIN, BASED ON DR. KITCHENS'S
10 COMPLAINTS, CHOSE TO MAKE THIS CHANGE. AGAIN, IT DOES
11 NOT DESCRIBE TO US SYMPTOM BURDEN OR SPECIFICALLY THE
12 CLINICAL THINKING, IT JUST SHOWS US THAT A MEDICATION
13 CHANGE HAS BEEN MADE.

14 Q. DOES IT TELL YOU ANYTHING ABOUT HOW DR. KITCHENS
15 -- HOW HIS FUNCTIONAL LIMITATIONS MIGHT BE CHANGED ON
16 THE MEDICATION?

17 A. NO, IT DOES NOT GIVE US ANY CLINICAL INFORMATION
18 ABOUT THAT.

19 Q. I WILL PULL NOW UP PX37. THIS IS A
20 SEPTEMBER 22ND PROGRESS NOTE FROM TINA HOLBROOK. WE
21 WILL SCROLL OVER SO EVERYONE CAN SEE WHAT IT IS. AND WE
22 WILL FOCUS IN -- I ACTUALLY WANT TO GO TO THE THIRD
23 PAGE, PLEASE, FIRST.

24 IF WE LOOK DOWN HERE, DOES THIS SHOW --
25 DID NURSE HOLBROOK DIAGNOSIS DR. KITCHENS WITH

1 GENERALIZED ANXIETY DISORDER?

2 A. SHE DID.

3 Q. NOW, GOING BACK TO THE FIRST PAGE OF THE
4 DOCUMENT, SCROLLING DOWN. IF WE CAN LOOK AT THE HISTORY
5 OF PRESENT ILLNESS AND ZOOM IN ON THAT A LITTLE.

6 OKAY. WHAT DOES THIS DESCRIPTION OF
7 HISTORY OF PRESENT ILLNESS TELL YOU ABOUT DR. KITCHENS'S
8 LEVEL OF FUNCTIONING AT THAT TIME RELATIVE TO HIS
9 CLAIMED IMPAIRMENT OF ANXIETY?

10 A. SO HE CLAIMS TO BE OVERWHELMED WITH THE PRESSURE
11 OF PASSING THE EXAMS, WHICH I AM ASSUMING HE IS
12 REFERRING TO USMLE, THAT THAT HAS BEEN -- HE HAS BEEN
13 STUDYING CONSTANTLY AND HE IS OVERWHELMED BY THAT WHOLE
14 PROCESS. BUT THEN HE SAYS, FEELS THAT OVERALL ANXIETY,
15 DEPRESSION IS WELL CONTROLLED WITH MEDICATION.

16 SO STRESS, BUT AGAIN, A LOT OF IT --
17 ANXIETY SYMPTOMS ARE NOT DESCRIBED, THERE IS NOT A HUGE
18 SYMPTOM BURDEN DESCRIBED, AND HE INDICATES THAT HIS
19 SYMPTOMS ARE UNDER CONTROL.

20 Q. LET ME ASK YOU THIS WITH REFERENCE TO ADDERALL.
21 IT SAYS VERBALIZED THAT HE DOES NOT TAKE MEDICATIONS ON
22 THE WEEKENDS OR WHEN HE DOES NOT HAVE TO COMPLETE
23 MENTALLY CHALLENGING TASKS.

24 WHAT DOES THAT TELL YOU ABOUT SORT OF
25 THIS FUNCTIONING RELATIVE TO THE CLAIMED ADHD?

1 A. SO AS PART OF THE DIAGNOSTIC CRITERIA FOR ADHD,
2 YOU ARE SUPPOSED TO SEE THE DISFUNCTION IN ALL WALKS OF
3 LIFE, NOT JUST ACADEMICALLY. AND SO PATIENTS I HAVE
4 WITH ADHD, WHO THEY CAN'T KEEP THEIR HOME CLEAN, THEY
5 DON'T PAY THEIR BILLS ON TIME, THE REST OF THEIR LIFE IS
6 JUST AS CHAOTIC AS THEIR WORK OR SCHOOL LIFE. AND SO
7 THEY NEED THE MEDICATION TO DO ALL OF THE BASIC
8 FUNCTIONS IN A TIMELY AND REASONABLE MANNER.

9 WHAT YOU WOULD SUGGEST IF HE ONLY NEEDS
10 IT WHEN HIS COGNITIVE DEMAND IS THE HIGHEST, SUCH AS ON
11 AN USMLE LICENSURE EXAM, THEN THAT LEADS AWAY FROM THE
12 DIAGNOSIS OF ADHD, AND INSTEAD, SUGGESTS JUST DIFFICULTY
13 WITH REALLY HARD TASKS, WHICH, I GUESS, IS TRUE FOR MOST
14 PEOPLE. SO THAT EVIDENCE IS SOMEWHAT CONTRADICTORY TO
15 THE DIAGNOSIS OF ADHD.

16 Q. IF WE LOOK DOWN TO THE SECOND PAGE, LOOKING TO
17 THE -- WE HAVE BEEN LOOKING AT OTHER DOCUMENTS. IF YOU
18 STOP THERE IN THE MIDDLE, THE PSYCHIATRIC BEHAVIORAL
19 SECTION.

20 WHAT IS REPORTED THERE?

21 A. POSITIVE FOR DECREASED CONCENTRATION, SLEEP
22 DISTURBANCE, DEPRESSED MOOD AND STRESS.

23 Q. YOU CAN KEEP GOING.

24 NOT GOING DOWN, WE ARE STILL ON THE --

25 A. YOU WANT ME TO KEEP READING? SORRY.

1 NEGATIVE FOR SUICIDAL IDEAS, THE PATIENT
2 IS NOT NERVOUS/ANXIOUS.

3 Q. WHAT DOES THIS TELL YOU?

4 A. SO THIS CORRELATES WITH THE SUBJECTIVE REPORT WE
5 GOT EARLIER THAT HE IS STRESSED OUT ABOUT HIS
6 CIRCUMSTANCES, THERE IS SOME DEPRESSED MOOD. BUT AGAIN,
7 NOT ANXIOUS, AND AS WE NOTICED EARLIER, THOUGHT THE
8 MEDICATIONS WERE KEEPING MOST OF HIS SYMPTOMS WELL
9 CONTROLLED, AND THIS SUBSTANTIATES THAT CLAIM.

10 Q. AND THEN I JUST --

11 THE COURT: EXCUSE ME, SORRY, MS. MEW,
12 DR. ALLEN, I HAVE TO INTERRUPT.

13 MS. MEW: I'M SORRY, I WAS NOT LOOKING AT
14 THE TIME, YOUR HONOR.

15 THE COURT: THAT'S ALL RIGHT. I WAS
16 WAITING FOR A GOOD SPOT, BUT THIS IS GOOD ENOUGH.

17 SO LET'S TAKE A BREAK NOW, AND WE WILL
18 REJOIN AT 10:20, ALL RIGHT EVERYONE?

19 (SHORT RECESS TAKEN.)

20 THE COURT: DR. KITCHENS, ARE YOU READY?

21 DR. KITCHENS: (DR. KITCHENS NODDED IN
22 THE AFFIRMATIVE.)

23 THE COURT: MS. MEW, YOU MAY PROCEED.

24 MS. MEW: I DO HAVE JUST ONE AREA OF
25 QUESTIONING LEFT ABOUT PX37. IF WE CAN PULL THAT BACK

1 UP AND GO TO THE TOP OF THE FIRST PAGE.

2 BY MS. MEW:

3 Q. SO I JUST WANTED TO CLARIFY SORT OF THE DATES.

4 IF WE LOOK HERE AT THE TOP OF THE PROGRESS NOTE, DR.

5 ALLEN, THE ENCOUNTER DATE IS SEPTEMBER 22, 2022?

6 A. RIGHT.

7 Q. AND ACTUALLY JUST FOR A MINUTE, LET'S TO GO THE

8 END OF THE DOCUMENT. MAYBE GO UP ONE.

9 SO WHAT DOES THIS SHOW?

10 A. THIS SHOWS A SIGNATURE LINE OF MS. HOLBROOK
11 SIGNED ON SEPTEMBER 22, 2022. THE ENCOUNTER DATE IS THE
12 SAME DAY, SO SHE WROTE A DOCUMENT, HER NOTE, AND SIGNED
13 IT THAT DAY.

14 AND ONCE THAT HAPPENS IN AN ELECTRONIC
15 MEDICAL RECORD, IT IS LOCKED. ONCE YOU SIGNED IT, YOU
16 CANNOT EDIT IT. AND SO -- AND THEN THE ONLY WAY TO
17 CHANGE IT IF YOU REALIZE YOU MADE AN ERROR IS TO GO BACK
18 AND DO AN ADDENDUM, WHICH SHOULD BE TRACKED.

19 Q. LET'S GO BACK UP TO THE TOP.

20 SO WHAT DOES THIS FILE DATE OF
21 SEPTEMBER 5, 2023 IN THIS STATUS ADDENDUM, WHAT DOES
22 THAT TELL YOU?

23 A. I THINK FEBRUARY 5TH, RIGHT.

24 Q. I'M SORRY, LET'S MAKE IT CLEAR FOR THE RECORD.

25 THE FILE DATE OF FEBRUARY 5, 2023 IN THE

1 STATUS ADDENDUM, WHAT DOES THAT TELL?

2 A. THIS INDICATES THAT THERE WAS A CHANGE TO
3 MEDICAL RECORD ON FEBRUARY 5TH. THE NOTE WAS COMPLETED
4 AND SIGNED ON SEPTEMBER 20, 2022, THEN AN ADDENDUM WAS
5 CREATED ON FEBRUARY 5, 2023.

6 MY REVIEW OF THIS DOCUMENT DOES NOT
7 EXPLICITLY SHOW ME WHAT HAS BEEN ADDENDED, BUT WE KNOW
8 THERE HAS BEEN AN ALTERATION TO THE NOTE AS OF THAT DAY.

9 Q. IS IN PRACTICE, IS THIS UNUSUAL?

10 A. TO GO BACK SIX MONTHS LATER IS VERY UNUSUAL TO
11 CHANGE A NOTE. OFTEN IF THERE IS AN ADDENDUM TO THE
12 NOTE, IT'S THE DAY AFTER. AS SOMEBODY WHO SUPERVISES
13 RESIDENTS, THEY WRITE A NOTE AND THEN THEY SEND IT AND
14 THEN THEY SEND IT TO ME, I WILL ADDEND THOSE. THAT'S
15 USUALLY WITHIN TWO OR THREE DAYS.

16 OR IF WHEN I AM SEEING A PATIENT I SIGN
17 SOMETHING AND THEN I LEARN ADDITIONAL INFORMATION THAT
18 DAY OR THE NEXT DAY OR MAYBE EVEN THE NEXT WEEK, TO
19 ADDEND ONE WITHIN A FEW DAYS IS NOT THAT UNCOMMON. IT'S
20 NOT THE NORM, BUT IT'S NOT THAT UNCOMMON. TO ADDEND ONE
21 MONTHS LATER IS VERY UNUSUAL. BECAUSE WHAT YOU ARE
22 SAYING IS AT THE TIME I SHOULD HAVE KNOWN THIS, NOT THAT
23 I HAD GOTTEN ADDITIONAL INFORMATION SIX MONTHS LATER.
24 THAT SHOULD BE A WHOLE NEW NOTE IF YOU ACQUIRED A WHOLE
25 LOT OF INFORMATION.

1 Q. WE CAN TAKE THIS DOWN. AND LET'S PULL UP DX28.
2 THIS IS A JANUARY 10, 2023 PROGRESS NOTE FROM TINA
3 HOLBROOK. AND IF WE GO TO PAGE 1164 OF THIS DOCUMENT,
4 SCROLL BACK UP TO WHERE -- THAT'S FINE. A LITTLE BIT
5 MORE. OKAY.

6 SO DID NURSE HOLBROOK DIAGNOSIS DR.
7 KITCHENS WITH ANXIETY IN THIS RECORD?

8 A. NO.

9 Q. LET'S GO BACK UP TO THE FIRST PAGE. AND GO DOWN
10 TO THE HISTORY.

11 WHAT DOES THE HISTORY OF PRESENT ILLNESS
12 TELL YOU ABOUT DR. KITCHENS'S LEVEL OF FUNCTIONING AT
13 THE TIME OF THIS REPORT?

14 A. HE NOTES THAT HE IS MORE ACCEPTING AND POSITIVE
15 ABOUT HIS CURRENT SITUATION; THAT HE STOPPED TAKING
16 PROZAC BECAUSE HE FELT HE'S MANAGING HIS SYMPTOMS OF
17 DEPRESSION AND ANXIETY WELL; HE FEELS THAT HIS ADHD
18 SYMPTOMS ARE CONTROLLED ON -- WHILE TAKING ADDERALL; AND
19 NOTES THAT HE DOES NOT TAKE IT EVERY DAY, ONLY WHEN
20 SUSTAINED MENTAL EFFORT IS REQUIRED; SLEEPING REASONABLY
21 WELL; NO SIDE EFFECTS.

22 SO IT SUGGESTS THAT HIS SYMPTOMS ARE WELL
23 CONTROLLED AT THIS TIME.

24 Q. LET'S NOW PULL UP DX35. THIS IS A VERY LENGTHY
25 RECORD OF FEBRUARY 6, 2023. A VERY LENGTHY FEBRUARY 26,

1 2023 RECORD FROM BAPTIST HEALTH. AND I WOULD LIKE TO GO
2 TO PAGE 61. LET'S SCROLL IN A LITTLE BIT ON PRESENT
3 ILLNESS.

4 DR. ALLEN, WHAT DOES THIS PRESENTATION
5 TELL YOU ABOUT DR. KITCHENS'S THEN CURRENT FUNCTIONING?

6 A. SO HE REPORTS ANXIETY OVER HIS LAWSUIT. HE HAS
7 ALREADY FILED FOR INJUNCTIVE RELIEF THAT DAY, OR IT WAS
8 DUE THAT DAY, SO HE IS IN THE MIDST OF FILING THAT. HE
9 SAYS THAT HIS DEPRESSION/ANXIETY WERE WORSE RECENTLY DUE
10 TO THIS CURRENT SITUATION AND THE STRESSORS, BUT HE
11 CONTINUES TO FEEL HIS ADHD SYMPTOMS ARE ADEQUATELY
12 CONTROLLED.

13 Q. IF YOU LOOK AT THE FIRST SENTENCE IN THIS
14 HISTORY OF PRESENT ILLNESS, WHAT DOES THIS SHOW DR.
15 KITCHENS GOING INTO -- WHAT IS THE PURPOSE OF THIS
16 VISIT?

17 A. HE SAYS HE IS REQUESTING A LETTER WITH CURRENT
18 DIAGNOSIS AS WELL AS ACCOMMODATIONS NEEDED IN RELATION
19 TO THE DIAGNOSIS.

20 Q. AND LET'S TURN TO PAGE 70 OF THIS PX35. SO THIS
21 IS A LETTER THAT IS IN THIS RECORD FROM TINA HOLBROOK.

22 DOES NURSE HOLBROOK RECOMMEND TESTING
23 ANXIETY BASED ON ANY SYMPTOMS OF ANXIETY OR FUNCTIONAL
24 IMPAIRMENT FROM ANXIETY?

25 A. NO.

1 Q. I WILL NOW PULL UP EXHIBIT PX46. THIS IS A
2 MARCH 24, 2023 PROGRESS NOTE FROM BAPTIST, THIS TIME
3 WITH DR. CHRISTINE BALLA. IF WE GO TO THE THIRD PAGE,
4 AND SCROLL DOWN.

5 DOES DR. BALLA DIAGNOSE DR. KITCHENS WITH
6 ANXIETY IN THIS REPORT?

7 A. SHE DOES.

8 Q. AND IF WE GO BACK TO PAGE ONE. AND IF WE GO
9 DOWN TO THE HISTORY OF PRESENT ILLNESS, PLEASE.

10 WHAT DOES THIS HISTORY OF PRESENT ILLNESS
11 TELL YOU ABOUT DR. KITCHENS'S MORE RECENT LEVEL OF
12 FUNCTIONING RELATIVE TO HIS CLAIMED ANXIETY?

13 A. HE REPORTS -- THIS IS ONE OF THE FIRST TIMES --
14 REALLY, THIS IS THE FIRST TIME WE HAVE EVER SEEN AN
15 ACTUAL DESCRIPTION OF REAL SYMPTOMS IN ANY OF THE
16 MEDICAL RECORDS WE HAVE DISCUSSED TODAY.

17 HE DESCRIBES A HEIGHTENED SENSE OF
18 ANXIETY RELATED TO HIS CURRENT CIRCUMSTANCES, WITH
19 SPECIFIC SYMPTOMS DESCRIBED, FEELS A SENSE OF TIGHTNESS
20 IN HIS BODY, PINKING IN HIS SKIN, MOTIVATION IS
21 DECREASED, ANHEDONIA, OR LACK OF ENJOYMENT IN TYPICALLY
22 ENJOYABLE ACTIVITIES, INTRUSIVE NEGATIVE THOUGHTS AND
23 FEELINGS OF GUILT, TEARFULNESS, HOPELESSNESS.

24 SO THESE ARE SYMPTOMS THAT I AM LOOKING
25 FOR IN ALL OF THESE RECORDS TO DEFINE ANXIETY, AND HE IS

1 REPORTING THEM NOW. SO SHE IS CONSIDERING ALL OF THAT
2 IN HER DIAGNOSIS. BUT AGAIN, THESE SYMPTOMS ARE
3 IMPORTANT FOR THE DIAGNOSIS, BUT THEY ARE NOT DESCRIBING
4 IN ANY WAY SPECIFICALLY HOW THEY IMPACT HIS TEST TAKING
5 ABILITY, OR, YOU KNOW, FUNCTIONAL LIMITATION IN AN
6 ACADEMIC SENSE.

7 Q. DO THEY SHOW A SUBSTANTIAL LIMITATION COMPARED
8 TO MOST PEOPLE?

9 A. NO, IT SHOWS THAT HE IS STRESSED OUT OVER A BAD
10 SITUATION, BUT THAT'S NOT THE SAME THING. IT ALSO
11 SUGGESTS LATER THAT, AGAIN -- THEY DESCRIBED ADHD
12 SYMPTOMS, AND THERE IS SOME OVERLAP WITH DISTRACTABILITY
13 DUE TO ANXIETY OR ADHD, BUT IT DOES SAY SPECIFICALLY
14 THAT HE IS FOCUSING WELL, THAT HE IS OVERALL -- THAT
15 THOSE SYMPTOMS ARE WELL CONTROLLED.

16 SO AGAIN, HE IS HAVING SOME SUBJECTIVE
17 SYMPTOMS OF ANXIETY, BUT THE COGNITIVE COMPONENT OF THAT
18 IS REPORTED AS WELL CONTROLLED.

19 Q. I HAVE ONE BIGGER PICTURE QUESTION THAT I MEANT
20 TO ASK YOU IN THE BEGINNING. YOU CAN TAKE THIS DOWN.

21 WHEN YOU ARE DOING AN ASSESSMENT FOR ANY
22 TYPE OF MENTAL DISORDER, CAN YOU RELY SOLELY ON A
23 PATIENT'S SELF REPORT?

24 A. WELL, SO, IT DEPENDS ON THE PURPOSE AND THE
25 FUNCTION OF THAT EVALUATION. WHEN I AM DOING A FORENSIC

1 EVALUATION, I ALWAYS HAVE EXTERNAL DATA, COLLATERAL
2 INFORMATION, WHETHER IT BE FAMILY, DOCUMENTATION,
3 PSYCHOLOGICAL TESTING.

4 IN A CLINICAL SETTING, IN A BUSY FAMILY
5 PRACTICE SETTING, THERE IS NOT TIME FOR THOSE KIND OF
6 THINGS. SO VERY COMMONLY THE DIAGNOSES ARE MADE SOLELY
7 ON SUBJECTIVE COMPLAINTS.

8 BUT WHEN WE ARE TAKING A CRITICAL LOOK
9 AT, DO THEY MEET CRITERIA FOR A DIAGNOSIS, DOES THAT
10 DIAGNOSIS HAVE SYMPTOMS THAT ARE SUFFICIENT ENOUGH TO
11 CAUSE FUNCTIONAL LIMITATION AND ULTIMATELY SUBSTANTIALLY
12 LIMIT SOMEBODY COMPARED THE GENERAL POPULATION. YOU
13 CAN'T JUST BASE THAT ON SUBJECTIVE COMPLAINT, BECAUSE
14 IT'S NOT THAT WE DON'T NECESSARILY TRUST THE PERSON
15 COMPLAINING, BUT PATIENTS DON'T HAVE PERSPECTIVE ON HOW
16 THEIR SYMPTOMS ARE COMPARED TO OTHER PEOPLE'S SYMPTOMS
17 WITH THE SAME DIAGNOSIS. THEY DON'T KNOW HOW ANYONE
18 ELSE EXPERIENCES THESE THINGS, EVEN -- THEY DON'T KNOW
19 HOW PEOPLE EXPERIENCE THE NORMALITY OF -- OR NORMALCY IN
20 TEST TAKING IN HIGH STRESS SITUATIONS AND ALL OF THOSE
21 OTHER THINGS, THEY ONLY KNOW THEIR SUBJECTIVE
22 COMPLAINTS.

23 SO BASING IT SOLELY ON ONE HUE IS REALLY
24 LIMITING, AND DOES NOT -- WHEN WE ARE TALKING ABOUT
25 DISABILITY, BY DEFINITION YOU ARE COMPARING TO THE

1 GENERAL POPULATION, YOU ARE COMPARING TO OTHERS. AND SO
2 YOU CAN'T JUST RELY UPON ONE PERSON'S PERSPECTIVE.

3 Q. SO JUST TO CLOSE, I WANTED TO GIVE A SENSE,
4 BECAUSE WE HAVE BEEN MORE INFORMAL ABOUT OUR EXPERT
5 REPORT, BUT JUST TO GIVE SORT OF A RUNDOWN OF THE
6 RECORDS YOU REVIEWED.

7 YOU REVIEWED DR. KITCHENS'S REQUEST FOR
8 ACCOMMODATIONS?

9 A. YES.

10 Q. AND HIS RECORDS FROM BEREA COLLEGE DISABILITY
11 SERVICES AND HEALTH SERVICES?

12 A. YES.

13 Q. RECORDS FROM WHITE HOUSE CLINICS?

14 A. YES.

15 Q. RECORDS FROM BAPTIST HEALTH?

16 A. YES.

17 Q. AND DID YOU READ THE CHRISTINA BACON REPORT AND
18 THE SOURCE MATERIAL FROM HER FILE?

19 A. I DID.

20 Q. DID YOU READ DR. KITCHENS'S DECLARATION FROM THE
21 PRELIMINARY INJUNCTION MOTION?

22 A. I DID.

23 Q. DID YOU READ THE DECLARATION OF MISSIE KING, DR.
24 KITCHENS'S MOTHER, FROM THE PRELIMINARY INJUNCTION
25 MOTION?

1 A. I DID.

2 Q. DID YOU REVIEW DR. KITCHENS'S SCHOOL TRANSCRIPTS
3 THAT WERE PRODUCED IN THIS CASE?

4 A. YES.

5 Q. DID YOU READ DR. KITCHENS'S USMLE SCORE REPORTS?

6 A. YES.

7 Q. AND DID YOU READ DR. KITCHENS'S TESTIMONY AT THE
8 PRELIMINARY INJUNCTION HEARING?

9 A. I DID.

10 Q. OKAY. AND WHEN YOU REVIEWED THESE RECORDS, YOU
11 WERE REVIEWING IT -- WE HAVE TALKED A LOT TODAY ABOUT
12 ANXIETY, BUT WERE YOU ALSO LOOKING THEM FROM AN ADHD
13 PERSPECTIVE AS WELL?

14 A. YES. I MEAN, I KIND OF -- WHEN I AM REVIEWING A
15 CASE, I AM ALWAYS LOOKING INTO HOW ALL OF THESE THINGS
16 INTERPLAY. THEY ARE NOT IN SILOS, THEY DO INTERACT, AND
17 SO I TRY TO LOOK AT THE ENTIRE PICTURE.

18 Q. FROM YOUR REVIEW, IS IT YOUR OPINION THAT DR.
19 KITCHENS IS SUBSTANTIALLY LIMITED COMPARED TO MOST
20 PEOPLE IN ANY MAJOR LIFE ACTIVITY RELEVANT TO TAKING THE
21 USMLE?

22 A. I DON'T THINK THAT HAS BEEN SUBSTANTIATED IN THE
23 RECORDS I REVIEWED.

24 Q. AND FROM YOUR REVIEW, IS IT YOUR OPINION THAT
25 DR. KITCHENS NEEDS 100 PERCENT EXTRA TIME IN ORDER TO

1 ACCESS THE USMLE?

2 A. NO.

3 MS. MEW: I DO NOT HAVE ANY FURTHER
4 QUESTIONS ON DIRECT, YOUR HONOR.

5 THE COURT: ALL RIGHT.

6 DR. KITCHENS, ARE YOU READY FOR CROSS?

7 DR. KITCHENS: YES, YOUR HONOR, I AM.

8 THE COURT: ALL RIGHT. YOU MAY PROCEED.

9 CROSS-EXAMINATION

10 BY DR. KITCHENS:

11 Q. GOOD MORNING, DR. ALLEN, HOW ARE YOU TODAY?

12 A. I AM DOING PRETTY WELL. THANK YOU.

13 Q. SEEMS LIKE WE ARE NEIGHBORS. I AM DOWN IN
14 RICHMOND.

15 A. NOT FAR AWAY.

16 Q. NOT THAT FAR AWAY AT ALL.

17 DR. ALLEN, I WOULD LIKE TO ASK YOU, HAVE
18 YOU EVER TESTIFIED IN COURT BEFORE TODAY?

19 A. YES.

20 Q. HOW MANY -- ROUGHLY, HOW MANY TIMES HAVE YOU
21 TESTIFIED IN COURT?

22 A. I HAVE TESTIFIED IN CRIMINAL CASES FOR THE STATE
23 PROBABLY 500 TIMES IN THE LAST 15 YEARS. I HAVE
24 TESTIFIED IN CIVIL HEARINGS AND TRIALS PROBABLY 50 TIMES
25 OR MORE.

1 Q. SO WOULD YOU CONSIDER YOURSELF A PROFESSIONAL
2 EXPERT IN TESTIMONY -- IN GIVING TESTIMONIES?

3 A. I HAVE DONE IT A LOT MORE THAN MOST, AND IT'S
4 PART OF MY PRACTICE. SO IN SOME SENSE, YES.

5 Q. AND ISN'T IT TRUE THAT YOU PRIMARILY USE -- YOU
6 TALKED ABOUT DIFFERENT PARTS THAT YOU WOULD -- THAT YOU
7 HAVE HAD TESTIFIED TO, BUT ISN'T IT TRUE THAT YOU
8 PRIMARILY TESTIFY IN WORKER'S COMP CLAIMS?

9 A. WELL, IN THE CIVIL WORLD, YES, THAT WOULD BE THE
10 MOST COMMON WORLD THAT -- OR SITUATION THAT I TESTIFY
11 IN. BUT AS FAR AS VOLUME, IT'S DEFINITELY THE CRIMINAL
12 ASSESSMENT, THAT'S ALMOST A WEEKLY BASIS I AM DOING
13 COMPETENCY HEARINGS.

14 Q. I IMAGINE THAT TAKES UP A LOT OF YOUR TIME.

15 DR. ALLEN, DID YOU EVER EVALUATE ME?

16 A. NO.

17 Q. HAVE YOU EVER MET ME BEFORE TODAY?

18 A. NO.

19 Q. AND WERE YOU PRESENT WHEN THE EVALUATIONS WERE
20 GIVEN TO ME?

21 A. NEVER.

22 Q. YOU MENTIONED EARLIER THAT YOU ARE LICENSED IN
23 SEVERAL DIFFERENT STATES, ISN'T THAT CORRECT?

24 A. YES.

25 Q. AND I THINK YOU SAID WAS IT OKLAHOMA, TENNESSEE,

1 KENTUCKY AND VIRGINIA?

2 A. WEST VIRGINIA, YES.

3 Q. WEST VIRGINIA, ALL RIGHT, YES.

4 ARE YOU FAMILIAR WITH THE FSMB THE
5 FEDERATION OF STATE MEDICAL BOARDS?

6 A. YES.

7 Q. CAN WE PULL UP, PLEASE, JX25. IF WE COULD
8 SCROLL TO THE TOP, PLEASE, SO HE CAN SEE IT.

9 DR. ALLEN, ARE YOU FAMILIAR WITH THIS
10 DOCUMENT FROM THE FSMB'S WEBSITE.

11 A. NOT SPECIFICALLY, BUT GENERALLY I OBVIOUSLY AM
12 JUST A LITTLE BIT.

13 Q. DOWN JUST A LITTLE BIT --

14 A. I'VE INTERACTED WITH THIS INFORMATION BEFORE, I
15 AM GENERALLY FAMILIAR WITH IT. I DON'T KNOW THAT I HAVE
16 LOOKED AT THIS DOCUMENT AT LEAST NOT IN THE LAST MANY,
17 MANY YEARS.

18 Q. UNDERSTOOD. YOU PROBABLY DON'T REALLY --
19 BECAUSE I KNOW GOING FORWARD, ESPECIALLY WITH APPLYING
20 FOR DIFFERENT STATES FOR SURE.

21 ONE THING I WOULD LIKE TO ALSO ASK YOU
22 CONCERNING THIS, ISN'T IT TRUE THAT EACH STATE HAS ITS
23 OWN REQUIREMENTS FOR LICENSURE?

24 MS. MEW: YOUR HONOR, I JUST WANT TO
25 OBJECT FOR THE RECORD THAT THIS IS REALLY BEYOND THE

1 SCOPE OF OUR DIRECT.

2 DR. KITCHENS: HE MENTIONED THAT HE WAS
3 LICENSED IN DIFFERENT STATES, HE OPENED THAT DOOR, AND I
4 AM JUST CLARIFYING IT.

5 MS. MEW: THAT WAS ADDRESSING HIS
6 EXPERTISE.

7 THE COURT: DR. KITCHENS, I WOULD JUST
8 SAY MS. MEW IS MAKING A GOOD POINT HERE, BUT I WANT TO
9 GIVE YOU SOME LEEWAY HERE AND SEE WHERE THIS GOES.

10 SO GO AHEAD.

11 BY DR. KITCHENS:

12 Q. SO I WILL ASK THE QUESTION FOR YOU AGAIN, DR.
13 ALLEN.

14 ISN'T IT TRUE THAT EACH STATE HAS ITS OWN
15 REQUIREMENTS FOR LICENSURE?

16 A. YES.

17 DR. KITCHENS: YOUR HONOR, AT THIS TIME I
18 WOULD LIKE TO ENTER JX25 INTO THE RECORD.

19 MS. MEW: I DON'T THINK IT'S RELEVANT,
20 AND I DON'T THINK IT'S BEEN AUTHENTICATED BY DR. ALLEN,
21 BUT...

22 THE COURT: I THINK WE HAVE GOT CLOSE
23 ENOUGH, GIVEN WHAT THE DOCUMENT IS, SO I AM GOING TO
24 ADMIT IT.

25 (PLAINTIFF JOINT EXHIBIT 25 IS ADMITTED

1 INTO EVIDENCE.)

2 BY DR. KITCHENS:

3 Q. DR. ALLEN, WOULD YOU AGREE THAT THE ONLY REVIEW
4 DOCUMENTATION SUCH AS THE DOCUMENT TRANSCRIPTS AND
5 SCHOOL RECORDS YOU PROVIDED WITH WERE GIVEN TO YOU BY
6 THE DEFENDANT?

7 A. THAT'S TRUE.

8 Q. HOW MANY ADHD EVALUATIONS HAVE YOU CONDUCTED IN
9 THE PAST YEAR?

10 A. SO LET ME CLARIFY THE QUESTION.

11 YOU MEAN LIKE EVALUATED A PATIENT I AM
12 PHYSICALLY SEEING FOR ADHD?

13 Q. YES, SIR.

14 A. PROBABLY 25 OR 30, SOMEWHERE IN THAT BALLPARK.

15 Q. AND WHAT ARE YOUR TOP THREE RELIABLE DIAGNOSTIC
16 TOOLS THAT YOU TEND TO GO TO WHEN DIAGNOSING A PATIENT
17 WITH ADHD?

18 A. WELL, I WILL REFER THEM BEFORE PRESCRIBING
19 PSYCHIATRIC MEDICATIONS IF THEY HAVE NOT HAD A VERY LONG
20 DOCUMENTED HISTORY. I WILL REFER THEM FOR PSYCHOLOGICAL
21 TESTING TO ONE OF MY PSYCHOLOGIST COLLEAGUES.

22 IN THOSE TESTS FOR AN ADHD EVAL, YOU WILL
23 LOOK FOR AN I.Q. TEST, YOU WILL LOOK FOR TEST OF
24 ATTENTION AND CONCENTRATION, LIKE A CONTINUOUS
25 PERFORMANCE EXAM. I WILL LOOK FOR EFFORT TESTING TO

1 MAKE SURE THAT ALL OF THOSE ARE VALID.

2 Q. SO YOU DON'T ACTUALLY PERFORM THESE DIAGNOSTIC
3 TESTS, YOU WILL REFER THEM OUT?

4 A. THAT'S RIGHT.

5 Q. AND WHY WOULD YOU PREFER TO REFER THEM TO
6 ANOTHER PERSON TO DIAGNOSIS THEM?

7 A. WELL, I AM NOT QUALIFIED TO ADMINISTER THOSE
8 TEST. IT'S ANALOGOUS TO WHEN I ORDER BLOOD TESTS, I
9 DON'T DRAW THE BLOOD AND SEND IT TO THE LAB AND PUT IT
10 IN THE CENTRIFUGE, I HAVE A LAB TECH DO THAT.

11 BUT THE FINAL RESULTS OF THE TESTING, I
12 CAN INTERPRET AND INCORPORATE INTO MY DIAGNOSIS. BUT
13 THE PROCESS OF DOING THAT TESTING, I DO NOT DO.

14 Q. SO YOU RELY ON THE DOCUMENTATION GIVEN TO YOU BY
15 THE PERSON WHO THEY ARE REFERRED TO, CORRECT?

16 A. THAT'S RIGHT.

17 Q. HAVE YOU EVER USED THE CONNOR'S CP3 TEST BEFORE?

18 A. YES. AGAIN, I DON'T ADMINISTER IT, I HAVE
19 SOMEONE ADMINISTER IT FOR ME. AND I HAVE REVIEWED THE
20 RESULTS MANY, MANY TIMES.

21 Q. OKAY. AND HAVE YOU EVER ADMINISTERED THE MOXO
22 DISTRACTIVE CONTINUATION PERFORMANCE TEST?

23 A. THAT ONE I HAVE NOT PERSONALLY HAD A PATIENT WHO
24 HAD THAT ADMINISTERED.

25 Q. AND HAVE YOU EVER PERSONALLY USED THE TOOL THAT

1 DIVA 2 TEST ON PATIENTS WITH ADHD?

2 A. I AM MORE FAMILIAR WITH THAT ONE, BUT I HAVE NOT
3 USED IT PARTICULARLY FOR MY PATIENTS.

4 Q. AND IN YOUR PARTICULAR LOCATION OF YOUR
5 PRACTICE, WHAT TENDS TO BE THE DEMOGRAPHICS OF YOUR
6 PATIENTS?

7 A. WELL, IT'S VERY DIFFERENT FOR EACH OF THE
8 LOCATIONS I HAVE MENTIONED, IT'S --

9 Q. SO PRIVATE PRACTICE.

10 A. FOR INSTANCE, WELL, WHERE I SEEING THE ADHD
11 PATIENTS MOSTLY THESE DAYS IS THE CLINIC I DO WITH UK
12 WHICH IT IS A ROYAL OUTREACH PROGRAM. AND SO WE ARE
13 SEEING PATIENTS THAT LIVE IN APPALACHIA VIA TELEMEDICINE
14 THROUGH THEIR PRIMARY CARE DOCTOR. AND SO IT'S SORT OF
15 A RURAL, LOW SOCIOECONOMIC GROUP, MANY OF THEM ON
16 MEDICAID.

17 THAT'S POP APPLICATION, THAT'S WHERE I AM
18 MOSTLY SEEING ADHD PATIENTS NOW.

19 Q. THANK YOU.

20 AND THIS IS THE PART-TIME POSITION,
21 CORRECT?

22 A. THAT'S RIGHT.

23 Q. AND HOW OFTEN -- OF THOSE PATIENTS THAT YOU ARE
24 DIAGNOSING IN THESE RURAL AREAS, HOW MANY OF THEM
25 AFRICAN AMERICAN?

1 A. FEW. LESS THAN TEN PERCENT.

2 Q. LESS THAN TEN PERCENT.

3 ISN'T IT TRUE THAT A PATIENT'S MEDICAL
4 HISTORY INCLUDES CURRENT AND PAST ILLNESSES?

5 A. THAT'S TRUE.

6 Q. IF WE CAN NOW PULL UP PX3, SO I AM SURE WE ARE
7 ALL FAMILIAR WITH THIS DOCUMENT. AND CAN YOU GO DOWN TO
8 THE MEDICAL RECORDS PART, PLEASE.

9 DR. ALLEN, DO YOU RECOGNIZE THIS
10 DOCUMENT?

11 A. I DO.

12 Q. DO YOU SEE WHERE IT SAYS, PAST MEDICAL HISTORY?

13 A. YES, SIR.

14 Q. CAN YOU READ THE SUBHEADING UNDER PAST MEDICAL
15 HISTORY?

16 A. IT SAYS, DIAGNOSIS AND THEN IT SAYS, ADHD.

17 Q. YES, THANK YOU.

18 AND THIS DOCUMENT HERE THAT WOULD BE
19 GIVEN TO THIS PHYSICIAN WOULD HAVE TO RELY ON -- WOULD
20 HAVE TO RELY ON DOING THEIR OWN -- DOING A DIAGNOSES,
21 RIGHT, USING -- LET ME CLARIFY. EXCUSE ME.

22 SO ON THIS PAGE HERE, FOR IT TO HAVE A
23 DIAGNOSES OF ADHD, ISN'T IT TRUE THAT SOME SORT OF
24 EVALUATION WOULD HAVE TO BE CONDUCTED?

25 A. NOT NECESSARILY BY THIS CLINICIAN. I MEAN, BUT

1 BY NATURE OF IT BEING PAST MEDICAL HISTORY MEANS IT'S IN
2 THE HISTORY. BUT I DON'T KNOW, BECAUSE WE HAVE ONLY
3 THIS ONE PAGE, WHETHER THIS CLINICIAN GOT IT FROM THE
4 ELECTRONIC MEDICAL OR GOT IT VERBALLY FROM YOU WHEN YOU
5 SAW THEM, OR -- I DON'T THINK WHAT IT'S BASED ON,
6 HONESTLY, BECAUSE THIS IS ALL WE HAVE IS THE LIST. AND
7 THAT COULD BE JUST LIKE A HOLDOVER FROM A PRIOR
8 ELECTRONIC RECORD NOTE.

9 Q. YES. BUT IN ORDER FOR IT TO -- SO YOU SPOKE
10 EARLIER ABOUT THAT IT'S NOT COMMON FOR A PHYSICIAN TO GO
11 SOLELY ON THE DOCUMENTATION COMING FROM THE PATIENT
12 ITSELF.

13 SO ESPECIALLY WITH ADHD, WOULDN'T IT BE
14 IRREGULAR BEHAVIOR FOR A PHYSICIAN TO DIAGNOSIS A
15 PATIENT IN THEIR MEDICAL RECORDS WITH ADHD WITHOUT
16 VERIFICATION?

17 MS. MEW: OBJECTION TO THE EXTENT IT
18 MISCHARACTERIZES PRIOR TESTIMONY.

19 THE WITNESS: SO -- I'M SORRY.

20 THE COURT: YOU CAN ANSWER.

21 THE WITNESS: OKAY. SO IT DEPENDS ON
22 WHAT THE DOCTOR IS DOING. ARE THEY JUST LISTING THINGS
23 THAT ARE REPORTEDLY PAST PSYCHIATRIC HISTORY OR MEDICAL
24 HISTORY, THEY MY NOT VERIFY EACH ONE OF THOSE. FOR
25 INSTANCE, IF I SEE SOMEBODY WHO TELLS ME THEY HAVE A

1 HISTORY OF HYPERTHYROIDISM, I AM NOT GOING TO
2 NECESSARILY GO INDEPENDENTLY VERIFY THAT, I MIGHT
3 INCLUDE IT IN MY PAST MEDICAL HISTORY. BUT IF I AM
4 GOING TO TREAT THAT DISORDER, PRESCRIBE A THYROID PILL,
5 I AM GOING TO DOUBLE CHECK THE LAB WORK AND MAKE SURE IT
6 IS THERE.

7 SO THIS CLINICIAN, IF THEY WERE
8 PRESCRIBING ADDERALL, THEY DEFINITELY SHOULD GO BACK AND
9 TAKE MORE THAN THE WORD FOR IT. BUT IF THEY ARE JUST
10 INCLUDING IT JUST TO FILL OUT THE HISTORY AND THAT'S NOT
11 THE PRIMARY FOCUS, THEN THEY MAY NOT. AND A
12 DERMATOLOGIST TYPICALLY WOULD NOT GO BACK AND
13 INDEPENDENTLY VERIFY A PSYCHIATRIC DIAGNOSIS.
14 BY DR. KITCHENS:

15 Q. RIGHT. AND SO WOULD A DERMATOLOGIST TYPICALLY
16 PRESCRIBE A MEDICATION FOR ADHD?

17 A. NO.

18 Q. OKAY. AND IF WE CAN SCROLL UP JUST A LITTLE
19 BIT, PLEASE, SO WE CAN SEE THE NAME ON HERE.

20 CAN YOU SEE IN THE TOP LEFT CORNER OF
21 THIS... THE NAME OF THE HOSPITAL HERE?

22 A. NORTHWEST MEDICINE.

23 Q. AND CAN WE SCROLL DOWN JUST A LITTLE BIT,
24 PLEASE, TO DR. KHAN'S LETTER. GO UP JUST A LITTLE BIT,
25 I THINK.

1 OKAY. JUST FOR THE SAKE OF TIME HERE,
2 DR. KHAN IS ALSO A PHYSICIAN IN THE SAME HOSPITAL --
3 HERE WE ARE HERE.

4 CAN YOU SEE AT THE TOP RIGHT? CAN YOU
5 READ WHAT HOSPITAL THAT IS?

6 A. NORTHWEST MEDICINE.

7 Q. AND WOULD YOUR EXPERIENCE AS A CLINICAL
8 PSYCHOLOGIST, ISN'T IT TRUE THAT IF YOU ARE WORKING
9 INSIDE A -- INSIDE OF THE SAME HOSPITAL THAT YOU WOULD
10 BE ABLE TO SEE THE MEDICAL RECORDS FIRSTHAND WITHIN THAT
11 PARTICULAR SYSTEM?

12 A. YES.

13 Q. THANK YOU. CAN YOU PLEASE GO BACK, PLEASE, TO
14 PX03.

15 AND BASED ON THIS PARTICULAR DIAGNOSIS --
16 AND FOR WHOLENESS, DR. KHAN WAS MY TREATING PHYSICIAN.
17 HE IS AN INTERNIST, FOR WHOLENESS, OKAY?

18 SO MY QUESTION IS HERE IS IF A MEDICAL
19 HISTORY LISTS A DIAGNOSES AND A DATE, THE DATE IN A CASE
20 WHEN THE DIAGNOSES WAS MADE, CORRECT?

21 A. YES.

22 Q. AND WHAT IS THE DATE THAT YOU SEE THERE?

23 A. 2013.

24 Q. AND IF WE CAN SCROLL UP, PLEASE, SO WE CAN SEE
25 THE DATE OF THIS MEDICAL RECORD.

1 CAN YOU SEE RIGHT UNDER IT SAYS -- RIGHT
2 UP UNDER THE ADDRESS IN THE GRAY BOX?

3 A. YES, THE VISIT DATE IS OCTOBER 5, 2020.

4 Q. OKAY. THANK YOU.

5 SO ACCORDING TO THIS RECORD, ISN'T IT
6 TRUE THAT I HAVE A DIAGNOSES OF ADHD?

7 A. YES.

8 Q. AND NOW THAT WE HAVE SEEN THAT WE HAVE A
9 DIAGNOSIS OF ADHD SINCE 2013, CORRECT, ISN'T THAT SHOWN?

10 A. THAT'S WHAT THAT INDICATES, YES.

11 Q. SO ISN'T IT TRUE THAT THERE IS THE -- THE FDA
12 MANDATES A MAXIMUM DOSAGE OF ADDERALL, CORRECT?

13 A. YES.

14 Q. AND DR. ALLEN, WHAT IS THAT MAXIMUM DOSAGE?

15 A. IT'S DIFFERENT FOR THE DIFFERENT FORMULATIONS.
16 THE LARGEST PILL SIZE OF ADDERALL XR, THE EXTENDED
17 RELEASE IS 30 MILLIGRAMS. I AM NOT SURE AS I SIT HERE,
18 BECAUSE I HAVE NOT LOOKED AT THE PDR RECENTLY, BUT THE
19 HIGHEST I TYPICALLY WILL PRESCRIBE OF THE SHORT ACTING
20 IS 20 MILLIGRAMS TWICE A DAY. SO 40 MILLIGRAMS A DAY.
21 I AM NOT EXACTLY SURE OFF THE TOP OF MY HEAD WHAT THE
22 MAXIMUM IS RECOMMENDED, BUT THAT'S ABOUT THE HIGHEST WE
23 WILL GO.

24 Q. AND YOU ARE CORRECT, 40 MILLIGRAMS IS THE
25 MAXIMUM AMOUNT THERE.

1 IF WE CAN SCROLL DOWN, PLEASE. IF WE CAN
2 SEE -- DO YOU SEE WHERE IT SAYS CURRENT OUTPATIENT
3 MEDICATIONS?

4 A. YES.

5 Q. SO AS A CLINICAL PSYCHIATRIST, ISN'T IT TRUE
6 THAT YOU CAN INFER THE SEVERITY OF A PATIENT'S DIAGNOSES
7 BASED ON THE PRESCRIPTION OF THE MEDICATION?

8 A. POTENTIALLY. THERE ARE OTHER FACTORS THAT GO
9 INTO THAT. EVERYBODY METABOLIZES DRUGS DIFFERENTLY,
10 BODY SIZE MAY HAVE SOMETHING TO DO WITH IT OR THE
11 DIFFERENCE BETWEEN MUSCLE VERSUS FAT, BECAUSE THE WAY
12 DRUGS ARE ABSORBED. BUT ALSO AFFECT IS A COMPONENT, SO
13 ALL OF THOSE THINGS ARE CONSIDERED.

14 Q. RIGHT, BUT FOR ADDERALL, IS THAT THE SAME CASE
15 FOR ADDERALL?

16 A. YES. ALL OF THOSE THINGS CAN BE -- CAN BE
17 CONSIDERED. FOR INSTANCE, YOUNG CHILDREN METABOLIZE
18 DRUGS FASTER, SO PER POUND OF BODY MASS, THEY ACTUALLY
19 HAVE HIGHER DOSES THAN ADULTS VERY COMMONLY, EVEN THOUGH
20 THEY ARE MUCH SMALLER PEOPLE, BECAUSE THEY METABOLIZE IT
21 FASTER. SO YOU ARE HAVE TO CONSIDERED ALL OF THOSE
22 THINGS.

23 Q. LET ME ASK YOU THIS, WOULD YOU AGREE THAT A
24 PATIENT WHO IS PRESCRIBED 30 MILLIGRAMS OF ADDERALL,
25 KNOWING THAT THE MAXIMUM DOSAGE IS 40 MILLIGRAM THAT IS

1 ALLOWED TO BE GIVEN, THAT THIS PERSON HAS A MODERATE TO
2 SEVERE LEVEL OF ADHD?

3 MS. MEW: I WANT TO OBJECT JUST BECAUSE I
4 THIN IT MISCHARACTERIZES THE EVIDENCE. DOESN'T THIS
5 SHOW 15 MILLIGRAMS IN ONE TABLET DAILY?

6 DR. KITCHENS: NO, MS. BACON, (SIC) IT
7 SAYS --

8 THE COURT: HOLD ON, DR. KITCHENS.

9 MS. MEW, SORRY, UNLESS THE WITNESS SAYS
10 THAT HE CAN'T READ WHAT IS BEING SHOWN, WE WILL LET THE
11 WITNESS READ IT FOR HIMSELF.

12 MS. MEW: OKAY, SORRY.

13 THE WITNESS: I'M SORRY, WHAT WAS THE
14 LAST QUESTION?

15 BY DR. KITCHENS:

16 Q. NO, THAT'S ALL RIGHT.

17 GIVEN HERE THE DOSAGE OF MEDICATION,
18 WOULD YOU AGREE THAT A PATIENT WHO IS PRESCRIBED
19 30 MILLIGRAMS OF ADDERALL, GIVEN THAT THE MAXIMUM AMOUNT
20 THAT CAN BE GIVEN IS 40 MILLIGRAMS, WOULD INDICATE A
21 MODERATE TO SEVERE LEVEL OF ADHD?

22 A. SO YES, SO IT DOES SAY 15 MILLIGRAMS BID, WHICH
23 IS LATIN FOR TWICE A DAY, SO IT IS 30 MILLIGRAMS A DAY
24 TOTAL.

25 BUT THAT BEING SAID, IT IS AN INDICATOR

1 OR SEVERITY, BUT IT IS ALSO AN INDICATOR OF THE OTHER
2 FACTORS THAT I MENTIONED. SO IT IS ONE OF THE FACTORS
3 THAT I CONSIDER, YES.

4 Q. BUT THE MAXIMUM DOSAGE THAT YOU ABLE TO GIVE
5 GIVE OUT BY REGULATION OF THE FDA IS 40 MILLIGRAMS
6 REGARDLESS?

7 A. YES.

8 Q. THANK YOU.

9 LET'S SEE HERE, HOW OFTEN DO YOU -- HOW
10 OFTEN DO YOU MEET AND REVIEW WITH PATIENTS ABOUT THIS
11 PARTICULAR MEDICATION?

12 A. LIKE HOW OFTEN AM I SEEING SOMEBODY WHO IS
13 TAKING ADDERALL?

14 Q. YES.

15 A. I WOULD SAY ALMOST EVERY WEEK AT LEAST ONE.

16 Q. AND DO YOU PRESCRIBE THIS MEDICATION TO THEM?

17 A. YES.

18 Q. AND FOR THAT -- FOR ONE GIVEN PATIENT THAT YOU
19 PRESCRIBED THAT MEDICATION WITH, HOW OFTEN DO YOU VISIT
20 WITH THEM?

21 A. TYPICALLY NO MORE THAN THE GAP. WE SEE THEM
22 TYPICALLY, IF THEY ARE VERY STABLE, EVERY TWO TO
23 THREE MONTHS AT MOST. WITH A STATEMENT LIKE THIS, IT IS
24 NEVER MORE THAN THREE MONTHS.

25 Q. IF YOU ARE WRITING THIS MEDICATION FOR A PATIENT

1 FOR THE VERY FIRST TIME, HOW OFTEN WOULD YOU MEET WITH
2 THIS PATIENT?

3 A. I WOULD SEE THEM WITHIN A MONTH.

4 Q. SO IF A PATIENT SHOWS YOU THAT THEY HAVE A PAST
5 MEDICAL HISTORY OF SEVERAL DIFFERENT YEARS OF THIS
6 MEDICATION, WOULD YOU -- WOULD YOU RECOMMEND MEETING
7 WITH THEM EVERY MONTH?

8 A. NO.

9 Q. SO YOU WOULD TAKE INTO ACCOUNT THE PRESCRIPTION
10 HISTORY, THE LENGTH OF THE HISTORY?

11 A. YES.

12 Q. OKAY. AND ISN'T IT TRUE THAT A PATIENT'S
13 LENGTHY PRESCRIPTION HISTORY WOULD INDICATE A VALIDATION
14 OF DIAGNOSES?

15 A. WELL, I MEAN IT SHOWS THAT ONE CLINICIAN THOUGHT
16 THAT THEY BENEFITTED FROM THE MEDICATION, BUT IT DOES
17 NOT SPECIFICALLY SAY THEY MET THE CRITERIA AS LAID OUT
18 IN THE DSM.

19 Q. OKAY. ISN'T IT TRUE THAT A PATIENT'S HISTORY OF
20 -- ISN'T IT TRUE THAT A PATIENT'S HISTORY OF -- LET'S
21 SAY HYPOTHETICALLY, YOU HAVE A PATIENT -- NO, LET ME
22 REASK THAT QUESTION TO BE MORE SPECIFICALLY.

23 ISN'T IT TRUE THAT A PATIENT WHO HAS BEEN
24 ON A MEDICATION FOR SEVERAL YEARS AND PRESCRIBED THIS
25 MEDICATION BY SEVERAL DIFFERENT PHYSICIANS WOULD BE A

1 GOOD INDICATOR THAT THIS PERSON HAS A DIAGNOSES?

2 A. IT IS AN INDICATOR, I AGREE.

3 Q. THANK YOU.

4 DR. ALLEN, ADHD IS A NEURODEVELOPMENTAL
5 DISORDER, CORRECT?

6 A. YES, SIR.

7 Q. ISN'T IT TRUE THAT A NEURODEVELOPMENTAL DISORDER
8 CANNOT BE CURED WITH MEDICATION?

9 A. TRUE.

10 Q. WOULD YOU AGREE THAT -- WELL, LET ME ASK THIS.

11 SO IF IT'S -- IF IT CANNOT BE CURED WITH
12 MEDICATION, ISN'T IT TRUE THEN THAT ADHD CAN BE A LIFE
13 SPAN DISORDER?

14 A. YES. IN SOME PEOPLE THE SEVERITY CAN WAX OR
15 WAYNE OVER THE LIFETIME, BUT IT TYPICALLY IS PERMANENT
16 AND THERE ARE SOME RESIDUAL SYMPTOMS FOR THEIR WHOLE
17 LIFE.

18 Q. MANY OF THE ADHD SYMPTOMS ARE SYMPTOMS OF
19 EXECUTIVE FUNCTION IMPAIRMENTS, CORRECT?

20 A. YES.

21 Q. IF I CAN NOW PULL UP -- IF YOU CAN NOW PULL UP
22 PE -- SORRY, PX49.

23 DO YOU RECOGNIZE THIS DOCUMENT HERE?

24 A. YES, THIS IS AN EXCERPT FROM THE DSM5.

25 Q. AND WHAT EXCERPT IS THIS FROM? SORRY, IS

1 ENTITLED UP HERE, THIS SECTION?

2 A. GENERALIZED ANXIETY DISORDER.

3 Q. OKAY. THANK YOU.

4 AND DO YOU SEE UNDERNEATH THE SUBHEADING,
5 DIAGNOSTIC FEATURES?

6 A. I DO.

7 Q. AND CAN YOU READ FOR ME THE LINES I HAVE
8 HIGHLIGHTED? IF YOU CAN HIGHLIGHT WHERE IT SAYS
9 ESSENTIAL FEATURES THERE, AND ZOOM IN JUST A LITTLE BIT
10 FOR DR. ALLEN'S CONVENIENCE, PLEASE

11 A. THE ESSENTIAL FEATURE OF GENERALIZED ANXIETY
12 DISORDER IS EXCESSIVE ANXIETY AND WORRY FOR APPREHENSIVE
13 EXPECTATION ABOUT A NUMBER OF EVENTS OR ACTIVITIES. THE
14 INTENSITY, DURATION, OR FREQUENCY OF THE ANXIETY AND
15 WORRY IS OUT OF PROPORTION TO THE ACTUAL LIKELIHOOD OR
16 IMPACT OF THE ANTICIPATED EVENT.

17 Q. THANK YOU, DR. ALLEN.

18 AND NOW CAN YOU SCROLL DOWN TO THE SECOND
19 PAGE AND THE LINE SAYS ABOUT THE INDIVIDUALS WITH
20 GENERALIZED ANXIETY DISORDER. DO YOU SEE THAT?

21 A. I SEE IT. THAT'S FINE. INDIVIDUALS WITH
22 GENERALIZED ANXIETY DISORDER REPORT SUBJECTED DISTRESS
23 DUE TO CONSTANT WORRY AND RELATED IMPAIRMENT IN SOCIAL
24 OCCUPATIONAL OTHER IMPORTANT AREAS OF FUNCTIONING.

25 Q. THANK YOU.

1 AND DR. ALLEN, YOU ARE A PART-TIME
2 PROFESSOR THE UNIVERSITY OF KENTUCKY, CORRECT?

3 A. YES.

4 Q. CAN YOU SEE HERE WHERE IT SAYS UNDER PREVALENCE,
5 THE HIGHLIGHTED SECTION, CAN YOU READ THAT FOR US,
6 PLEASE?

7 A. INDIVIDUALS OF THE EUROPEAN DESCENT TEND TO
8 EXPERIENCE GENERALIZED ANXIETY DISORDER MORE FREQUENTLY
9 THAN DO INDIVIDUALS OF NON-EUROPEAN DESCENT, ANY ASIAN,
10 AFRICAN, NATIVE AMERICAN AND PACIFIC ISLANDER.

11 Q. DR. ALLEN, WHY DO YOU PERCEIVE THERE ARE MORE --
12 THAT IT IS PREVALENT IN INDIVIDUALS OF EUROPEAN DESCENT
13 THAN CAUCASIANS?

14 A. THAT'S A REALLY COMPLEX QUESTION, BUT MY
15 PERCEPTION IS THAT EVERY SOCIETY AND CULTURE HAS THEIR
16 OWN MENTAL ILLNESS THAT IS PERVASIVE IN THAT CULTURE.
17 AND SO WHILE EUROPEAN DESCENT HAS MORE GENERALIZED
18 ANXIETY DISORDER, I THINK WE WOULD SEE THAT EACH OF
19 THESE OTHER GROUPS TEND TO HAVE MORE OTHER SYMPTOMS,
20 EITHER DEPRESSION OR MAYBE EVEN PANIC DISORDER OR
21 OBSESSIVE COMPULSIVE TRAITS. SO BASED ON YOUR CULTURE,
22 THE ILLNESS YOU HAVE, I THINK A LOT OF THOSE ILLNESSES I
23 HAVE JUST DESCRIBED HAVE COMMON BIOLOGICAL CAUSES, BUT
24 THEY DISPLAY THEMSELVES IN DIFFERENT WAYS BASED ON YOUR
25 CULTURE, UPBRINGING, CIRCUMSTANCES AND STRESSORS.

1 AND SO I THINK OVERALL MOST CULTURES HAVE
2 SIMILAR LEVELS OF MENTAL ILLNESS, THEY JUST EXPRESS
3 THEMSELVES IN DIFFERENT MANNERS.

4 Q. THANK YOU.

5 AND YOU MENTIONED EARLIER WHEN YOU WERE
6 EXPLAINING THIS, BUT FOR CLARIFICATION.

7 SO COULD LACK OF ACCESS BE A REASON THAT
8 PEOPLE ARE NOT ABLE TO BE DIAGNOSED?

9 A. THERE IS NO DOUBT THAT THERE IS AN ACCESS
10 PROBLEM FOR MENTAL HEALTH SERVICES IN THIS COUNTRY, AND
11 THAT MINORITIES ARE DISPROPORTIONATELY SUBJECTED TO THAT
12 LACK OF ACCESS, THAT IS UNDOUBTED.

13 AND SO CAN THAT IMPACT THE WAY WE FIND
14 THE PREVALENCE OF THESE CONDITIONS? IT IS POSSIBLE.

15 Q. AND NOW CAN WE SCROLL DOWN TO THE FOURTH PAGE,
16 PLEASE.

17 AND DO YOU SEE UNDER FUNCTIONAL
18 CONSEQUENCES OF GENERALIZED ANXIETY DISORDER?

19 A. YES.

20 Q. AND JUST FOR THE RECORD, CAN YOU, PLEASE, READ
21 THIS, PLEASE?

22 A. SURE.

23 EXCESSIVE WORRYING IMPAIRS THE
24 INDIVIDUAL'S CAPACITY TO DO THINGS QUICKLY AND
25 EFFICIENTLY, WHETHER AT HOME OR AT WORK. THE WORRYING

1 TAKES TIME AND ENERGY. THE ASSOCIATED SYMPTOMS OF
2 MUSCLE TENSION AND FEELING KEYED UP OR ON EDGE,
3 TIREDNESS, DIFFICULTY CONCENTRATING AND DISTURBED SLEEP
4 CONTRIBUTE TO THE IMPAIRMENT. IMPORTANTLY, THE
5 EXCESSIVE WORRYING MAY IMPAIR THE ABILITY OF THE
6 INDIVIDUALS WITH GENERALIZED ANXIETY DISORDER TO
7 ENCOURAGE CONFIDENCE IN THEIR CHILDREN. GENERALIZED
8 ANXIETY DISORDER IS ASSOCIATED WITH THE SIGNIFICANT
9 ABILITY AND DISTRESS THAT IS INDEPENDENT OF CO-MORBID
10 DISORDERS AND MOST NONINSTITUTIONALIZED ADULTS WITH THIS
11 DISORDER ARE MODERATELY TO SERIOUSLY DISABLED.

12 GENERALIZED ANXIETY DISORDER ACCOUNTS FOR
13 110,000,000 DISABILITY DAYS PER ANA IN THE U.S.
14 POPULATION.

15 Q. THANK YOU, DR. ALLEN.

16 DR. KITCHENS: YOUR HONOR, AT THIS TIME I
17 WOULD LIKE TO ADD IN PX49 INTO THE RECORD.

18 MS. MEW: NO OBJECTION.

19 THE COURT: ADMITTED.

20 (PLAINTIFFS JOINT EXHIBIT 49 IS ADMITTED
21 INTO EVIDENCE.)

22 BY DR. KITCHENS:

23 Q. THANK YOU.

24 AND AT THIS TIME I WOULD LIKE TO PULL UP
25 PX30. AND ZOOM IN. THANK YOU.

1 DR. ALLEN, DO YOU SEE THIS DOCUMENT ON
2 THE SCREEN?

3 A. I DO.

4 Q. DO YOU SEE THE ASSESSMENT PROCEDURES PERFORMED
5 AS PART OF THIS EVALUATION?

6 CAN YOU SCROLL DOWN WHERE IT SAYS
7 ASSESSMENTS PROCEDURES?

8 A. YES, I SEE THAT. YES.

9 Q. AND JUST FOR TIME'S SAKE HERE, YOU DO RECOGNIZE
10 IT, CORRECT?

11 A. I DO, YES, I RECOGNIZE THIS REPORT.

12 Q. AND IF WE CAN SCROLL DOWN TO PAGE 130, IT SHOWS
13 THE RESULTS. YES.

14 SO ON HERE, WHAT I AM SHOWING YOU ARE THE
15 RESULTS OF THE ACHENBACH STEP REPORT.

16 DO YOU SEE THOSE?

17 A. YES.

18 Q. AND CAN YOU EXPLAIN WHAT THESE FINDINGS WERE?

19 A. SO AS YOU MENTIONED, THE ACHENBACH IS A
20 SELF-REPORT MEASURE. YOU ARE ANSWERING QUESTIONS ABOUT
21 SYMPTOMS, AND SO THIS IS INDICATING WHICH SYMPTOMS OF
22 INATTENTION AND/OR HYPERACTIVITY/IMPULSIVITY ARE
23 ACKNOWLEDGED OR REPORTED IN THIS SELF-REPORT MEASURE.
24 AND IT GOES INTO EACH ONE, AND THEN IT KIND OF COMPILES
25 THOSE ON THE BOTTOM TO GIVE YOU A RAW SCORE AND A T

1 SCORE.

2 T SCORES ARE STATISTICAL ANALYSIS WHERE
3 50 IS AVERAGE AND 10 IS A STANDARD. SO T SCORES OF 76
4 AND 75 ARE ELEVATED. AND THEN THEY GAVE A PERCENTILE
5 INDICATING THAT THERE IS A CLINICAL CONCERN ABOUT BOTH
6 OF THESE PROBLEMS. SO BASED ON THIS SELF-REPORT
7 MEASURE, YOU HAVE INDICATED CLINICAL PROBLEMS IN BOTH
8 INATTENTION AND HYPERACTIVITY/IMPULSIVITY.

9 Q. AND IS THERE ANY REASON FOR YOU TO DOUBT THE
10 VALIDITY OF THIS DOCUMENT?

11 A. WELL --

12 Q. WE CAN SCROLL THROUGH.

13 A. THERE IS NO VALIDITY SCALE ON THE ACHENBACH. IT
14 IS SELF-REPORT, IT IS FACE VALID, SO IT IS BASED ON THE
15 INTERPRETATION OF THE PERSON GIVING THE RESPONSES. SO
16 IT'S WHOLLY BASED ON THEIR SUBJECTIVE COMPLAINTS.

17 SO I HAVE NO REASON TO BELIEVE THAT THESE
18 AREN'T YOUR SUBJECTIVE COMPLAINTS, BUT AGAIN, THERE IS
19 NO VALIDITY SCALE BUILT INTO THAT TEST.

20 Q. THANK YOU SO CAN WE SCROLL DOWN, PLEASE. SCROLL
21 DOWN, KEEP GOING. IF WE CAN ZOOM OUT. I THINK IT'S
22 TOWARD THE BOTTOM, THE MOXO. YES, HERE.

23 DO YOU SEE THIS, DO YOU SEE THE LANGUAGE
24 HERE ON THE SCREEN?

25 A. YES.

1 Q. AND DO YOU UNDERSTAND -- DO YOU UNDERSTAND THE
2 RESULTS OF THIS MOXO TEST?

3 A. I DO.

4 Q. AND DO YOU UNDERSTAND HOW THE MOXO TEST WORKS?

5 A. YES. MOST OF THE CONTINUOUS PERFORMANCE EXAMS
6 ARE SLIGHT VARIATIONS OF THE SAME PROCESS OR COMPUTER AS
7 AN EXAM, YOU GET SHOWN THINGS FOR A CERTAIN AMOUNT OF
8 TIME AND YOU HAVE TO ACKNOWLEDGE SOME THINGS AND IGNORE
9 OTHERS, STIMULI. IT'S A -- AND THEN, AGAIN, THERE IS
10 SLIGHT TWEAKS WITH ALL THE DIFFERENT TYPES, LIKE THE
11 CONNORS AND MOXO, BUT THEY ARE ALL BASED ON THE SAME
12 PHILOSOPHY.

13 Q. YES. AND CAN YOU SEE WHAT THE T SCORE SAYS
14 THERE?

15 A. WELL, SO THE T SCORES --

16 Q. JUST FOR THE RECORD, CAN YOU JUST SAY THE NUMBER
17 FOR THE T SCORE?

18 A. WELL, I AM LOOKING -- THE T SCORE THAT IS
19 SHOWING HERE IS STILL ACHENBACH, THAT'S ALL I SEE.

20 Q. IS THAT FOR THE ACHENBACH?

21 A. THIS IS THE SECOND HALF OF THE ACHENBACH THAT
22 WAS DONE BY YOUR SPOUSE. THIS IS NOT THE MOXO RESULTS.
23 THESE ARE YOUR WIFE'S ACHENBACH RESULTS HERE.

24 Q. SCROLL DOWN HERE. YOU SAID THE MOXO IS THERE,
25 SORRY ABOUT THAT. SCROLL DOWN SOME MORE, PLEASE. KEEP

1 GOING, TOWARDS THE RESULTS. KEEP GOING, PLEASE. I WILL
2 TELL YOU WHEN TO STOP. HERE.

3 DO YOU SEE WHERE IT SAYS THE DIAGNOSTIC
4 IMPRESSIONS THERE?

5 A. YES, I DO.

6 Q. AND CAN YOU READ THAT OUT LOUD FOR THE RECORD?

7 A. ATTENTION DEFICIT-HYPERACTIVITY DISORDER,
8 COMBINED PRESENTATION.

9 Q. IS THERE ANY REASON FOR YOU TO DOUBT THE
10 VALIDITY OF THE MOXO -- THE MOXO EVALUATION?

11 A. YES. THERE IS SOME RESEARCH ON THE MOXO THAT I
12 HAVE LOOKED AT RECENTLY IN AN ARTICLE IN, I THINK, THE
13 JOURNAL OF ATTENTION DISORDER IN 2021 THAT LOOKED AT THE
14 MOXO SPECIFICALLY, AND IT COMPARED THREE GROUPS THAT
15 THEY GAVE THE MOXO TO. ONE WAS NORMAL, QUOTE, UNQUOTE,
16 NORMAL, WHATEVER THAT MEANS. ONE GROUP WAS DIAGNOSED
17 WITH ADHD AND ONE GROUP WAS SIMULATORS.

18 AND, FOR INSTANCE, ON THE INATTENTION
19 SCALE, NORMAL PEOPLE HAD A Z SCORE AND A Z SCORE IS A
20 STATISTICAL ANALYSIS WHERE ZERO IS NORMAL, MINUS ONE IS
21 STANDARD DEVIATION BELOW THE MEAN. NORMAL PEOPLE WERE
22 MINUS .7. SO ALMOST NORMAL. ADHD OR MINUS TWO ON
23 AVERAGE AND SIMULATORS WERE MINUS NINE ON AVERAGE. THE
24 SCORE ON THIS MOXO WAS A MINUS 15. SO THIS IS MUCH
25 CLOSER TO A SIMULATOR RESPONSE THAN AN ADHD RESPONSE.

1 Q. SO I WILL -- FOR THE RECORD, WE DON'T HAVE ANY
2 PROOF OF THIS INFORMATION THAT YOU WERE SAYING HERE.

3 BUT ONE THING I WILL SAY ON THIS EXAM,
4 AND ACCORDING TO MS. BACON'S DEPOSITION, AND ALSO IN HER
5 TESTIMONY IN THE PRELIMINARY INJUNCTION, ARE YOU AWARE
6 THAT THE MOXO HAS BUILT-IN SYSTEMS THAT INDICATES WHEN A
7 PATIENT IS FAKING THE SYSTEM?

8 A. YES, THERE IS A SCALE CALLED A-PRIME, WHICH CAN
9 BE REPORTED AND I DON'T SEE IT IN HER REPORT, SO THAT
10 INFORMATION WAS NOT AVAILABLE TO ME.

11 Q. THANK YOU. CAN WE REMOVE THIS DOCUMENT, PLEASE?
12 IF WE CAN NOW PULL UP DX35.

13 DR. ALLEN, DO YOU RECOGNIZE THAT
14 DOCUMENT, RIGHT?

15 A. I DO.

16 Q. OKAY. AND IF WE CAN SCROLL TO -- IF WE CAN
17 SCROLL DOWN TO THE PAGE WHERE -- YES, SCROLL IN. DO YOU
18 SEE -- SCROLL IN JUST A LITTLE BIT MORE. I CAN'T EVEN
19 SEE THAT. ZOOM IN A LITTLE MORE.

20 SO YOU TALKED A LITTLE BIT ABOUT -- AND
21 WE ARE NOW TALKING ABOUT -- DO YOU SEE WHERE IT SAYS
22 HISTORY OF PRESENT ILLNESS?

23 A. I DO.

24 Q. AND DO YOU SEE THE LINE WHERE -- AND THIS IS A
25 DOCUMENT FROM MS. TINA HOLBROOK. WE CAN SCROLL DOWN

1 JUST A.

2 BIT DO YOU SEE THE LINE WHERE SHE STATES,
3 CONTINUES TO FEEL THAT ADHD SYMPTOMS ARE ADEQUATELY
4 CONTROLLED WITH CURRENT MEDICATION REGIMENT?

5 A. YES.

6 Q. ISN'T IT TRUE THAT THIS IS A COMMON STATEMENT
7 MADE BY A MEDICAL PROFESSIONALS IN ORDER TO INDICATE
8 THAT THE MEDICATION DOSAGES DOES NOT INDICATE A CHANGE,
9 OR SHOULD NOT BE CHANGED?

10 A. YES.

11 Q. ISN'T IT TRUE THAT YOU HAVE NOTICED THIS SAME
12 LANGUAGE ON THE -- FROM SEVERAL DIFFERENT MEDICAL
13 PROVIDERS IN THE DOCUMENTS YOU WERE PROVIDED BY THE
14 NBME?

15 A. I AGREE.

16 Q. THANK YOU. IF WE CAN GET RID OF THAT ONE. IF
17 WE CAN NOW MOVE TO PX37. IF YOU CAN BRING UP PX37,
18 PLEASE.

19 AND DR. ALLEN, DO YOU RECOGNIZE THIS
20 DOCUMENT FROM EARLIER?

21 A. YES, I DO.

22 Q. AND DO YOU SEE -- IF WE CAN HIGHLIGHT ON HERE
23 WHERE IT SAYS, FEELING DOWN, SAD AND BEING EASILY
24 OVERWHELMED.

25 DO YOU RECOGNIZE THIS STATEMENT HERE?

1 A. I DO.

2 Q. YOU JUST TESTIFIED THAT YOU HAVE NOT SEEN AN
3 INDICATION OF SYMPTOMS PRIOR TO DR. BALLA'S
4 DOCUMENTATION ON 3/24/2023, CORRECT?

5 A. RIGHT. I WAS TALKING ABOUT VERY SPECIFIC
6 SYMPTOMS OF HOW THESE CONDITIONS ARE ACTUALLY EFFECTING
7 LIKE -- AND RESULTING IN REAL LIFE EXPERIENCES. THIS
8 TALKS ABOUT KIND OF THE SEVERITY ON AN UPTAKE, BUT IT'S
9 NOT NEARLY AS SPECIFIC AS DR. BALLA SHOULD HAVE --

10 Q. I AM NOT ASKING ABOUT SPECIFICS, BUT IT IS TRUE
11 THAT YOU HAVE SEEN SIGNS AND SYMPTOMS INDICATED IN THIS
12 DOCUMENT BEFORE DR. BALLA'S DOCUMENTATION, CORRECT?

13 A. VERY BRIEFLY, BUT YES, SIR.

14 Q. OKAY. THANK YOU.

15 DR. ALLEN, IF A PATIENT HAS A
16 DEVELOPMENTAL DISORDER, THERE ARE NO PRE IMPAIRMENTS OF
17 RECORDS.

18 ONE THING I WOULD LIKE TO ASK YOU IS
19 THAT, ISN'T IT TRUE THAT IF A PERSON HAS A DEVELOPMENTAL
20 DISORDER THAT THEY MAY NOT HAVE PREMATURE DOCUMENTATION
21 OF THIS?

22 A. IT HAPPENS, SOMETIMES. YOU HAVE KIND OF ELUDED
23 TO IT. IF YOU HAVE LACK OF ACCESS EITHER FROM AN
24 EDUCATIONAL STANDPOINT OR MEDICAL STANDPOINT, THERE ARE
25 TIMES THAT THOSE RECORDS ARE NOT AVAILABLE. YES, THAT

1 DOES HAPPEN.

2 Q. AND ACCORDING TO YOUR WEBSITE OF YOUR PRIVATE
3 PRACTICE, YOU HAVE INDICATE THAT ACADEMIC RECORDS MAY BE
4 USEFUL FOR DETERMINING PRIOR LEVELS OF FUNCTIONING,
5 CORRECT?

6 A. YES.

7 Q. WOULD YOU CONSIDER ACADEMIC RECORDS TO INDICATE
8 AN INDIVIDUAL'S EXECUTIVE FUNCTION?

9 A. THAT IS ONE -- EXECUTIVE FUNCTION IS ONE --

10 Q. YOU CAN JUST ANSWER YES OR NO IF THAT'S EASIER.

11 A. WELL, I MEAN IT IS ONE OF THE COMPONENTS,
12 ABSOLUTELY.

13 Q. AND ISN'T IT TRUE THAT ADHD IS ASSOCIATED WITH
14 REDUCED SCHOOL PERFORMANCE?

15 A. GENERALLY, YES.

16 Q. PART OF YOUR TESTIMONY TODAY WAS BASED OFF OF
17 RECORDS WHERE I WAS DIAGNOSED WITH ADHD IN 2013 AND
18 2014, CORRECT?

19 A. THERE WAS REFERENCE BACK TO THOSE DATES, YES.

20 Q. AND EARLIER YOU ALSO TESTIFIED THAT A PERSON
21 TAKING ADDERALL WOULD BE MORE FOCUSED, CORRECT?

22 A. YES.

23 Q. AND ISN'T IT TRUE THAT THERE IS A STIGMA THAT
24 COLLEGE STUDENTS ABUSE ADDERALL TO BE MORE FOCUSED AND
25 TO RECEIVE BETTER GRADES?

1 A. YES, UNFORTUNATELY THAT HAS BEEN A GROWING
2 PROBLEM.

3 Q. AND IF A PERSON WITHOUT ADHD TAKING ADDERALL
4 WITHOUT -- SORRY, WITHOUT ACTUALLY HAVING IT, HAVING --
5 LET ME CLARIFY, SORRY.

6 IF A PERSON WITHOUT ADHD TAKES ADDERALL,
7 WOULDN'T YOU SEE A CHANGE IN THEIR GRADE PERFORMANCE?

8 A. SO, PROBABLY. THEY HAVE A SUBJECTIVE
9 IMPROVEMENT IN ATTENTION AND CONCENTRATION, THAT HAS
10 BEEN REALLY STRONGLY PROVEN. AND THEY PROBABLY HAVE
11 SOME IMPROVED FOCUS OF DURATION AND THAT SORT OF THINGS
12 WHEN CRAMMING FOR TESTS, THAT SORT OF THING.

13 Q. IN YOUR PROFESSIONAL OPINION AS A PSYCHIATRIST,
14 WHAT DO YOU PERCEIVE TO THE REASON WHY NONE -- PATIENTS
15 WITHOUT ADHD SEEK OUT THE DRUG ADDERALL?

16 A. I THINK PATIENTS DO SEEK ADDERALL WITHOUT THAT
17 DIAGNOSIS. AND THEN THAT'S -- IT BECAME A BIG PROBLEM
18 IN THE LAST TEN YEARS, SO WE ARE SEEING PEOPLE COME TO
19 OUR CLINIC AND THE STUDENT HEALTH CLINICS WANTING
20 STIMULANTS THAT DO NOT MEET CRITERIA. THAT DOES HAPPEN.

21 Q. AND COLLEGE STUDENTS IN PARTICULAR, WHY DO THEY
22 SEEK OUT ADDERALL, THOSE WHO DO NOT HAVE THE DIAGNOSES
23 OF ADHD?

24 A. WELL, AGAIN, THERE IS SOME GOOD RESEARCH TO SHOW
25 THAT IF YOU TAKE IT, YOU FEEL BETTER ABOUT THE WAY YOU

1 ARE PERFORMING. AND THEN THERE IS PROBABLY ALSO SOME
2 PERFORMANCE BENEFIT ALSO, BUT THE SUBJECTIVE WELL-BEING
3 IS PRETTY POWERFUL. THE STUDENTS THINK THEY DO BETTER
4 AND THEY WANT TO TAKE IT.

5 Q. AND WHAT IS THE MECHANISM OF ACTION OF ADDERALL?

6 A. IT INCREASES THE AVAILABLE DOPAMINE IN SYNAPSES
7 IN THE BRAIN, WHICH TENDS TO BE STIMULATING. IN SOME
8 WAYS, IT'S LIKE COCAINE, BUT A MUCH Milder VERSION OF
9 IT. IT WORKS IN THE SAME MANNER.

10 Q. SO IS DOPAMINE STIMULATING OR IS NOREPINEPHRINE
11 STIMULATING?

12 A. BOTH, ACTUALLY. THEY BOTH -- AND IT HAS SOME
13 NOREPINEPHRINE FUNCTION ALSO, BUT THEY ARE BOTH
14 STIMULATING TRANSMITTERS.

15 Q. CAN WE PULL UP JX04, PLEASE?

16 DO YOU RECOGNIZE THIS DOCUMENT?

17 A. I DO.

18 Q.

19 DR. KITCHENS: AND JUST FOR THE RECORD,
20 THIS IS A DOCUMENT JX04 IS MY COLLEGE TRANSCRIPT AT
21 BEREA COLLEGE.

22 BY DR. KITCHENS:

23 Q. DR. ALLEN. I AM SURE YOU ARE PROBABLY FAMILIAR
24 WITH IT?

25 A. YES, I AM.

1 Q. YES.

2 AS WE WAS TALKING ABOUT BEFORE, CAN YOU
3 SEE -- CAN YOU READ MY SCIENCE CLASS HERE?

4 A. MODERN BIOLOGY, FALL OF '22 WAS A C PLUS.

5 Q. YES. AND CAN WE SCROLL DOWN -- YES.

6 DO YOU SEE THE FOUNDATIONS OF CHEMISTRY?

7 A. RIGHT. THAT'S A D GRADE IN THE FALL OF 2011.

8 Q. AND THEN CAN YOU GO OVER.

9 DO YOU SEE BOTANY THERE?

10 A. BOTANY GRADE WAS A C.

11 Q. AND CAN WE SCROLL OVER TO THE LEFT?

12 DO YOU SEE IF YOU SCROLL UP TOWARDS
13 ZOOLOGY, GO UP FIRST.

14 A. YES.

15 Q. WHAT GRADE IS INDICATED THERE?

16 A. THAT'S A D, AS IN DOG.

17 Q. DO YOU SEE BELOW THAT MICROBIOLOGY FOR 222?

18 A. I DO, AND IT LOOKS LIKE IT IS WITHDRAW/FAILING.

19 Q. WITHDRAW/FAILING.

20 AND DO YOU SEE ORGANIC CHEMISTRY ONE?

21 A. YES, THAT'S A D, AS IN DOG.

22 Q. THANK YOU, DR. ALLEN.

23 SO ISN'T IT TRUE THAT IF I WAS TAKING
24 ADDERALL AT THIS TIME WITHOUT ADHD, THAT THOSE GRADES
25 WOULD MOST LIKELY BE SIGNIFICANTLY HIGHER?

1 A. I DON'T KNOW, I CANNOT EVEN REALLY -- WITHIN A
2 REASONABLE DEGREE OF MEDICAL CERTAINLY, I CANNOT ANSWER
3 THAT QUESTION. THERE ARE SO MANY THINGS THAT GO INTO
4 GRADES. IT'S POSSIBLE IT COULD BE HIGHER, BUT WE DON'T.

5 Q. YOU INDICATED EARLIER THAT ADDERALL HELPS
6 INCREASES CONCENTRATION, CORRECT?

7 A. GENERALLY, YES.

8 Q. YOU INDICATED EARLIER THAT ADDERALL IS A
9 STIMULANT, CORRECT?

10 A. YES.

11 Q. ADDERALL BEING A STIMULANT WOULD GIVE A PERSON
12 WITHOUT ADHD EXTRA ENERGY, CORRECT?

13 A. YES.

14 Q. AND SIDE EFFECTS OF ADDERALL ARE WHAT, DR.
15 ALLEN?

16 A. THE PRIMARY ONE WE WORRY ABOUT IS SUPPRESSING
17 THE APPETITE, SO IN YOUNG KIDS CAN CAN BECOME A HUGE
18 PROBLEM. NOT AS BIG OF A PROBLEM IN ADULTS TYPICALLY.
19 THE OTHERS CAN BE HEADACHES, STOMACH PAIN, IT INCREASE
20 BLOOD PRESSURE.

21 Q. YES.

22 AND DR. ALLEN, IS INSOMNIA PART OF THE
23 ADVERSE AFFECT OF ADDERALL?

24 A. IT CAN BE, ESPECIALLY IF YOU TAKE IT LATER IN
25 THE DAY. SO WE TRY TO MAKE SURE THE DOSING IS TAKEN AS

1 EARLY AS POSSIBLE. BUT IF YOU TAKE IT LATER, IT
2 CERTAINLY CAN INTERFERE WITH SLEEP INITIATION.

3 Q. SO IT IS TRUE THAT ADDERALL WOULD DECREASE A
4 PERSON'S SLEEPING HABITS?

5 A. IT CAN.

6 Q. LET'S SEE HERE.

7 DR. KITCHENS: AND AT THIS TIME, YOUR
8 HONOR, LET'S SEE -- ONE SECOND, PLEASE. SORRY ABOUT
9 THIS, DR. ALLEN.

10 THE WITNESS: NO PROBLEM.

11 DR. KITCHENS: I HAVE NO FURTHER
12 QUESTIONS, YOUR HONOR.

13 THE COURT: ALL RIGHT.

14 MS. MEW, REDIRECT?

15 MS. MEW: NO REDIRECT, YOUR HONOR.

16 THE COURT: I JUST HAD JUST A COUPLE OF
17 SMALL QUESTIONS.

18 BY THE COURT:

19 Q. ONE IS, I DIDN'T MAKE A NOTE OF THIS, SO I'M NOT
20 SURE -- I'M NOT ASKING IT TO BE REPETITIVE IF IT WAS
21 ALREADY ASKED.

22 BUT, DR. ALLEN, ARE YOU ONE OF THE NBME'S
23 REVIEWERS FOR DISABILITY ACCOMMODATION REQUESTS?

24 A. I AM.

25 Q. OKAY. THE SECOND QUESTION IS, DID YOU WATCH ANY

1 DR. KITCHENS'S CASE IN CHIEF THE FIRST FEW DAYS OF THIS
2 WEEK?

3 A. NONE OF IT.

4 THE COURT: OKAY. THOSE ARE MY ONLY
5 QUESTIONS.

6 ANYTHING ELSE FROM -- I GUESS, I WILL
7 ASK, JUST IN CASE, MS. MEW OR DR. KITCHENS, A RESPONSE
8 TO WHAT I JUST ASKED?

9 MS. MEW: NO, YOUR HONOR.

10 DR. KITCHENS: NO, YOUR HONOR.

11 THE COURT: DR. ALLEN, THANK YOU FOR YOUR
12 TIME. YOU MAY BE EXCUSED.

13 THE WITNESS: THANK YOU.

14 THE COURT: ALL RIGHT. LET'S SEE, SO IF
15 BY MY COUNT, MS. MEW, YOU HAVE ONE MORE WITNESS.

16 MS. MEW: ONE MORE WITNESS, YOUR HONOR.

17 THE COURT: OKAY. WHY DON'T WE -- I
18 WOULD LIKE TO HAVE THE LUNCH BREAK TODAY BE LIKE 12:15
19 TO 1:00 OR SO, JUST BASED ON A COUPLE OF CALLS I HAVE TO
20 MAKE. ASSUMING THAT'S OKAY WITH YOU, DO YOU WANT TO --
21 IS THE WITNESS READY, OR DO YOU HAVE TO --

22 MS. MEW: I WILL JUST NEED TO CALL HIM.

23 I WOULD NOT MIND JUST A VERY QUICK BREAK. CAN WE TAKE A
24 FIVE-MINUTE BREAK?

25 THE COURT: WHY DON'T WE TAKE FIVE, AND

1 THEN RESUME -- WE WILL START THE WITNESS AND THEN WE
2 WILL STOP FOR LUNCH 12:15.

3 MS. MEW: OKAY, THANK YOU.

4 (RECESS TAKEN.)

5 THE COURT: ALL RIGHT.

6 MS. MEW, ARE YOU READY?

7 MS. MEW: YES, THANK YOU, YOUR HONOR.

8 THE NATIONAL BOARD OF MEDICAL EXAMINERS
9 CALLS DR. DANIEL JURICH. YOU CAN COME ON CAMERA.

10 THE COURT: HELLO, DR. JORDAN.

11 THE WITNESS: HELLO, YOUR HONOR.

12 THE COURT: LYNN, WOULD YOU PLEASE SWEAR
13 IN THE WITNESS?

14 THE COURT REPORTER: CAN YOU PLEASE RAISE
15 YOUR RIGHT HAND?

16 (DEFENSE WITNESS, DR. DANIEL JURICH, IS
17 SWORN.)

18 THE COURT REPORTER: CAN YOU PLEASE STATE
19 AND SPELL YOUR NAME FOR THE RECORD.

20 THE WITNESS: DANIEL JURICH, D-A-N-I-E-L
21 J-U-R-I-C-H.

22 DIRECT EXAMINATION

23 BY MS. MEW:

24 Q. GOOD MORNING, DR. JURICH.

25 A. GOOD MORNING.

1 Q. WHAT IS YOUR CURRENT POSITION?

2 A. I AM THE ASSOCIATE VICE-PRESIDENT OF THE USMLE
3 PROGRAM.

4 Q. HOW LONG HAVE YOU BEEN IN THIS POSITION?

5 A. A LITTLE OVER A YEAR.

6 Q. HOW LONG HAVE YOU WORKED WITH NBME?

7 A. I WORKED AT THE NBME FOR ABOUT NINE YEARS.

8 Q. AND CAN YOU BRIEFLY LIST THE OTHER POSITIONS YOU
9 HAVE HELD?

10 A. YES. PRIOR TO THIS POSITION I WORKED IN THE
11 PSYCHOMETRICS UNIT. I WAS A PSYCHOMETRICIAN, SENIOR
12 PSYCHOMETRICIAN AND THEN A MANAGER IN THE PSYCHOMETRICS
13 DEPARTMENT.

14 Q. WHAT IS A PSYCHOMETRICIAN?

15 A. I WOULD SAY BRIEFLY A PSYCHOMETRICIAN IS SOMEONE
16 WHO SPECIALIZES IN THE APPLICATION OF STATISTICAL
17 TECHNIQUES AND MEASUREMENT SCIENCE CONCEPTS TO THE
18 DEVELOPMENT ADMINISTRATION AND SCORING OF AN EXAM, TO
19 ENSURE THAT THE EXAM IS A VALID, FAIR, RELIABLE MEASURE
20 OF WHAT IS INTENDING TO ASSESS.

21 Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?

22 A. I HAVE A MASTER'S IN QUANTITATIVE PSYCHOLOGY AND
23 A DOCTORATE IN ASSESSMENT AND MEASUREMENT, WHICH IS --
24 THERE ARE MANY TERMS FOR PSYCHOMETRICS, SO IT'S ONE OF
25 THEM.

1 Q. IN YOUR WORK AS A ASSOCIATE VICE-PRESIDENT OF
2 USMLE AND AS A PSYCHOMETRICIAN FOR NBME, ARE YOU
3 FAMILIAR WITH THE USMLE EXAMINATION?

4 A. I AM FAMILIAR WITH THE USMLE, YES.

5 Q. AND DOES PART OF YOUR WORK AS A PSYCHOMETRICIAN
6 AT NBME OVER THE PAST APPROXIMATELY NINE YEARS, ARE YOU
7 FAMILIAR WITH EXAMINEE TEST PERFORMANCE DATA?

8 A. YES, I HAVE INTERACTED WITH TEST PERFORMANCE AS
9 PART OF THE ROLE.

10 Q. DO YOU USE -- THANK YOU. I THINK YOU JUST
11 ANSWERED THE QUESTION I WAS GOING TO ASK.

12 WHEN DO YOU MOST MEDICAL STUDENTS TAKE
13 THE STEP 1 EXAMINATION?

14 A. STEP 1 TYPICALLY FOR A U.S. MEDICAL GRADUATE
15 IT'S TAKEN IN THE SECOND YEAR BEFORE STARTING CLINICAL
16 CLERKSHIPS AFTER FINISHING THE PRECLERKSHIP PERIOD.

17 Q. IS THERE ANY BENEFIT TO TAKING IT AFTER THE
18 SECOND YEAR MEDICAL SCHOOL, LIKE CONTEMPORANEOUS WITH
19 IT?

20 A. MY UNDERSTANDING FROM STUDENTS AND THE FACULTY
21 TAKING IT AFTER PRECLERKSHIP PERIODS, THAT IS WHEN THE
22 CURRICULUM IS FOCUSED ON THE CONTENT COVERED IN STEP 1.
23 SO IT'S REASONABLE FOR EXAMINEES TO TAKE IT AFTER HAVING
24 EXPOSURE, LEARNING FROM THAT CONTENT.

25 Q. AND THEN WHEN DO MOST MEDICAL STUDENTS TAKE THE

1 STEP 2 CK EXAMINATION?

2 A. THE STEP 2 CK EXAMINATION IS TYPICALLY TAKEN IN
3 THE FOURTH YEAR AFTER THE EXAMINEES HAVE FINISHED THEIR
4 CLINICAL CLERKSHIPS, WHICH IS THE PERIOD THAT THE
5 CURRICULUM ARE FOCUSED, ON CLINICAL KNOWLEDGE ASSESSED
6 IN STEP 2 CK.

7 Q. AND JUST FOR COMPLETENESS, WHEN IS STEP 3
8 TYPICALLY TAKEN?

9 A. STEP 3 IS TYPICALLY TAKEN IN RESIDENCY, USUALLY
10 IN THE FIRST OR SECOND YEAR.

11 Q. AND UNDER USMLE PROGRAM RULES, MAY EXAMINEES
12 TAKE EACH STEP EXAM MORE THAN ONE TIME?

13 A. YES, EACH STEP EXAM CAN BE TAKEN UP TO FOUR
14 TIMES.

15 Q. WHY THERE IS A LIMIT TO THE NUMBER OF ATTEMPTS?

16 A. THE LIMIT WAS INFORMED BY STATE MEDICAL BOARDS.
17 THE MAJORITY OF STATE MEDICAL BOARDS ALREADY HAD A FOUR
18 ATTEMPT LIMIT. AND WE FELT THAT ALIGNING WITH THEM,
19 WITH THE BEST SERVICES OF PROTECTING THE PUBLIC.

20 AND IN CONSIDERING THIS DECISION, WE ALSO
21 REVIEWED DATA ASSOCIATED WITH PERFORMANCE THAT SHOULD
22 EXAMINEES WHO ATTEMPT MORE THAN FOUR TIMES TYPICALLY DO
23 NOT FINISH THE USMLE SEQUENCE, AND THEY ALSO TYPICALLY
24 HAVE HIGHER BOARD SANCTIONS, WHICH ARE GIVEN UNDER
25 CONDITIONS WHERE THE STATE MEDICAL BOARD MUST SANCTION

1 THEM FOR SOME DISCIPLINARY ACTION.

2 Q. UNDER CURRENT POLICIES, ARE ALL ATTEMPTS ON A
3 STEP EXAM CURRENTLY REPORTED ON A SCORE TRANSCRIPTS?

4 A. YES, ALL ATTEMPTS WOULD BE REPORTED ON THE
5 TRANSCRIPT.

6 Q. HOW LONG IS THE STEP 1 EXAM?

7 A. STEP 1 IS 280 ITEMS ROPED INTO SEVEN SECTIONS OF
8 40 ITEMS EACH, EACH SECTION IS GIVEN 60 MINUTES OR AN
9 HOUR. SO THAT'S SEVEN HOURS. AND THEN THERE IS ALSO
10 15 MINUTES FOR THE TUTORIAL AND 45 MINUTES OF BREAK
11 TIME. SO IT'S AN EIGHT-HOUR EXAM.

12 Q. DID YOU MENTION, DO EXAMINEES RECEIVE ANY BREAK
13 TIME ON THE STEP 1 EXAM?

14 A. TO BE CLEAR, YES, 45 MINUTES OF BREAK TIME IS
15 ALLOTTED. THERE IS A 15-MINUTE TUTORIAL, AND ANY TIME
16 UNUSED OF THAT 15 MINUTES WOULD CARRY OVER INTO THE
17 BREAK TIME.

18 Q. HOW LONG IS THE STEP 2 CK EXAM?

19 A. THE STEP 2 CK HAS SIMILAR STRUCTURE, WITH AN
20 ADDITIONAL SECTION. IT'S APPROXIMATELY 318 ITEMS. IT
21 HAS THEN EIGHT SECTIONS OF 40 ITEMS, ABOUT ITEMS.
22 APPROXIMATELY 40 ITEMS. EACH OF THE SECTIONS IS AN
23 HOUR. AND THE EXAMINEES HAVE THE SAME 45 MINUTES BREAK
24 TIME ALONG WITH THE 15 MINUTES OF TUTORIAL TIME THAT CAN
25 BE CARRIED INTO BREAK.

1 Q. WHAT I WOULD LIKE TO DO NEXT IS PULL UP A SERIES
2 OF DOCUMENTS AND SEE IF WE CAN GET THOSE ALL ADMITTED.
3 AND THEN WE WILL BE ABLE TO TALK ABOUT THEM A LITTLE
4 EASIER. SO IF WE CAN FIRST PULL UP JX14 HAS ALREADY
5 BEEN ADMITTED.

6 LET'S PULL UP JX15. SO FIRST, LET'S JUST
7 EXPLAIN WHAT THIS DOCUMENT IS. MAYBE IF WE CAN -- CAN
8 WE --

9 FIRST, JUST GENERALLY, DR. JURICH, WHAT
10 IS THIS DOCUMENT WITH TIMING REVIEW AT THE TOP?

11 A. YES. THIS IS A REPORT PRODUCED BY THE NBME
12 SYSTEMS THAT PROVIDES INFORMATION ABOUT HOW AN EXAMINEE
13 WOULD USE THEIR TIMING THROUGHOUT THE DIFFERENT SECTIONS
14 OF A SPECIFIC ADMINISTRATION OF A STEP EXAM.

15 Q. AND THEN LET'S JUST EXPLAIN THE DATA THAT IS
16 SHOWN IN THE REPORT.

17 SO UP IN YOUR TOP BOX, WHAT IS IT TELLING
18 YOU?

19 A. THE TOP BOX CONTAINS GENERAL INFORMATION ON WHAT
20 EXAM IT WAS, I.D. INFORMATION RELATED TO THE CANDIDATE,
21 THE CANDIDATE'S NAME AND WHERE THEY HAVE COMPLETED THE
22 EXAM.

23 AND IF YOU ARE SPEAKING OF THE ACTUAL BOX
24 ABOVE KIND OF THE TABLE, THAT ALSO CONTAINS SIMILAR
25 GENERAL INFORMATION, WHEN THE EXAM WAS TAKEN. STEP 1 IS

1 A ONE DAY EXAM, SO IT'S DAY ONE. THE ALLOTTED DAYTIME,
2 WHICH IS THE LOTTED TIME TO TEST AND THEN THE ALLOTTED
3 BREAK TIME, WHICH WE HAVE DISCUSSED EARLIER. AND THE
4 END OF SESSION INDICATES WHEN THE SESSION WAS CLOSED IN
5 TERMS OF THE 24-HOUR CALENDAR TIME.

6 Q. AND BEFORE WE TALK ABOUT ANY OF THE SPECIFICS IN
7 HERE, WHAT DOES THIS EXHIBIT JX15 -- WHOSE'S DATA IS
8 THIS?

9 A. THIS IS -- I WOULD SAY NBME OUTCOME DATA THAT WE
10 RECEIVED AFTER THE EXAMINEE COMPLETES THEIR TESTING
11 EXPERIENCE.

12 Q. I GUESS I AM MORE BASICALLY -- IS THIS THE
13 TIMING REVIEW FOR DR. KITCHENS'S STEP 1 EXAM ON MAY 9,
14 2022?

15 A. YES. YOU CAN SEE IN THE VERY TOP OF THE
16 DOCUMENT THAT IT IS DR. KITCHENS'S STEP 1 EXAM FROM
17 MAY 9, 2022.

18 MS. MEW: WE MOVE TO ADMIT EXHIBIT JX15
19 INTO EVIDENCE.

20 DR. KITCHENS: NO OBJECTIONS, YOUR HONOR.

21 THE COURT: ADMITTED.

22 (DEFENSE EXHIBIT JX 15 IS ADMITTED INTO
23 EVIDENCE.)

24 BY MS. MEW:

25 Q. AND LET'S JUST PULL UP JX16.

1 DR. JURICH, IS THIS THE TIMING REVIEW FOR
2 DR. KITCHENS'S STEP 2 EXAM TAKEN ON MAY 28, 2022?

3 A. YES.

4 MS. MEW: AND WE MOVE TO ADMIT EXHIBIT
5 JX16 INTO THE RECORD.

6 DR. KITCHENS: NO OBJECTION.

7 THE COURT: ADMITTED.

8 (DEFENSE EXHIBIT JX 16 IS ADMITTED INTO
9 EVIDENCE.)

10 BY MS. MEW:

11 Q. IF WE CAN TURN TO JX17.

12 IS THIS THE TIMING REVIEW FOR DR.

13 KITCHENS'S STEP 2 EXAM ON JUNE 29, 2022?

14 A. YES.

15 MS. MEW: WE MOVE TO ADMIT EXHIBIT JX17
16 INTO THE RECORD.

17 DR. KITCHENS: NO OBJECTIONS.

18 THE COURT: ADMITTED.

19 (DEFENSE EXHIBIT JX17 IS ADMITTED INTO
20 EVIDENCE.)

21 BY MS. MEW:

22 Q. THEN IF WE PULL UP JX18.

23 IS THIS THE TIMING REVIEW FOR DR.

24 KITCHENS'S STEP 1 EXAM FROM SEPTEMBER 29, 2022?

25 A. YES.

1 MS. MEW: MOVE TO ADMIT EXHIBIT JX18 INTO
2 THE RECORD.

3 DR. KITCHENS: NO OBJECTIONS.

4 THE COURT: ADMITTED.

5 (DEFENSE EXHIBIT JX 18 IS ADMITTED INTO
6 EVIDENCE.)

7 BY MS. MEW:

8 Q. THE BIG PICTURE HERE, DR. JURICH, ARE THE TIMING
9 REVIEW DOCUMENTS THAT WE HAVE SEEN JX14, JX15, 16, 17
10 AND 18, ARE THEY BASED ON DATA ROUTINELY CAPTURED BY
11 NBME AS PART OF AN EXAMINEE'S TEST DATA SO HERE DR.
12 KITCHENS'S DATA?

13 A. YES.

14 Q. AND IS THE DATA GATHERED AT THE TIME OF TESTING?

15 A. YES.

16 Q. AND THEN ARE THE TIMING REVIEWS -- THE TIMING
17 REVIEW DATA MAINTAINED BY NBME IN THE ORDINARY COURSE OF
18 ITS BUSINESS?

19 A. YES.

20 Q. LET'S GET ANOTHER SET OF DOCUMENTS IN AND THEN
21 WE WILL GO BACK. SO WE CAN PULL UP JX19. LET'S SCROLL
22 OUT ON THIS ONE RIGHT NOW SO WE CAN SEE THE FIRST PAGE.

23 CAN YOU GENERALLY EXPLAIN THE DATA IN
24 THIS TYPE OF REPORT?

25 A. SURE. THIS REPORT PRESENTS DATA RELATED TO THE

1 INDIVIDUAL ITEMS IN TERMS OF THE SEQUENCE ON AN
2 EXAMINEE. I HAVE SEEN THEM, THEIR SCORE ON THAT ITEM,
3 THE RESPONSE THEY PROVIDED AND THEN THE TIMING THAT --
4 THE TIME THEY SPENT ON THE ITEM.

5 Q. AND I WILL JUST REPRESENT THAT THERE WAS A
6 COLUMN WITH THE USMLE I.D. NUMBER TO IDENTIFY
7 DR. KITCHENS'S DATA, BUT INSTEAD HAVING REDACTIONS ALL
8 THROUGHOUT, WHICH CREATES A LOT OF LAG TIME, WE JUST
9 TOOK THAT AWAY.

10 MS. MEW: BUT DR. KITCHENS, YOU HAVE
11 RECEIVED THEM IN THOSE FORMS AND WILL YOU STIPULATE THAT
12 THIS IS YOUR DATA?

13 DR. KITCHENS: YES, I WILL STIPULATE THAT
14 I DID ASK YOU TO REMOVE THAT COLUMN.

15 MS. MEW: DO YOU AGREE THAT THIS IS DATA
16 THAT PERTAINS TO YOUR TEST?

17 DR. KITCHENS: WELL, I CAN'T NECESSARILY
18 TELL BY JUST LOOKING AT ANSWERS, BUT I DID ASK YOU TO
19 REMOVE THAT.

20 MS. MEW: WOULD YOU RATHER THAT WE USE
21 THE DATA WITH YOUR NUMBERS ON IT, YOUR USMLE NUMBERS?

22 DR. KITCHENS: UNLESS -- I AM OKAY WITH
23 THAT FOR NOW, AS LONG AS WE SUBMIT THIS ONE INTO THE
24 RECORD.

25 MS. MEW: OKAY. LET'S DO THIS, BECAUSE

1 THIS IS WHAT I'VE GOT ALL KEYED UP.

2 DR. KITCHENS: IT'S FINE. FOR TIME SAKE,
3 IT'S FINE.

4 BY MS. MEW:

5 Q. ALL RIGHT. SO THIS DATA HERE AT JX19, WITH THAT
6 REPRESENTATION AND AGREEMENT, IS THIS DOCUMENT SHOWING
7 THE OUTCOME DATA FOR DR. KITCHENS'S FEBRUARY 22, '20 --
8 FEBRUARY 25, 2022 STEP 1 EXAM?

9 A. YES.

10 MS. MEW: NBME MOVES TO ADMIT EXHIBIT
11 JX19 INTO THE RECORD.

12 DR. KITCHENS: NO OBJECTIONS.

13 THE COURT: ADMITTED.

14 (DEFENSE EXHIBIT JX19 IS ADMITTED INTO
15 EVIDENCE.)

16 BY MS. MEW:

17 Q. AND IF WE CAN PULL UP EXHIBIT JX20.

18 IS THIS THE OUTCOME DATA FOR

19 DR. KITCHENS'S MAY 9, 2022 STEP 1 EXAM?

20 A. YES.

21 MS. MEW: NBME MOVES TO ADMIT JX20 INTO
22 THE RECORD.

23 DR. KITCHENS: NO OBJECTIONS.

24 THE COURT: ADMITTED.

25 (DEFENSE EXHIBIT JX20 IS ADMITTED INTO

1 EVIDENCE.)

2 BY MS. MEW:

3 Q. IF WE CAN PULL UP EXHIBIT JX21.

4 IS THIS THE OUTCOME DATA FOR

5 DR. KITCHENS'S SEPTEMBER 29, 2022, STEP 1 EXAM?

6 A. YES.

7 MS. MEW: NBME MOVES TO ADMIT EXHIBIT

8 JX21 INTO THE RECORD.

9 DR. KITCHENS: NO OBJECTIONS.

10 THE COURT: ADMITTED.

11 (DEFENSE EXHIBIT JX21 IS ADMITTED INTO

12 EVIDENCE.)

13 BY MS. MEW:

14 Q. WE CAN PULL UP JX22.

15 IS THIS THE OUTCOME DATA FOR

16 DR. KITCHENS'S MAY 28, 2022 STEP 2 CK EXAM?

17 A. YES.

18 MS. MEW: NBME MOVES TO ADMIT EXHIBIT

19 JX22 INTO THE RECORD.

20 DR. KITCHENS: NO OBJECTIONS.

21 THE COURT: JX22 IS ADMITTED.

22 (DEFENSE EXHIBIT JX22 IS ADMITTED INTO

23 EVIDENCE.)

24 BY MS. MEW:

25 Q. AND THEN IF WE PULL UP JX23.

1 IS THIS THE OUTCOME DATA FOR

2 DR. KITCHENS'S JUNE 19, 2022 STEP 2 EXAM?

3 A. I THINK IT'S JUNE 22ND, CORRECT? I'M SORRY, THE
4 29TH, JUNE 29TH. SORRY.

5 Q. LET'S DO IT AGAIN, JUST FOR THE RECORD.

6 IS THIS THE OUTCOME DATA FOR

7 DR. KITCHENS'S JUNE 29, 2022 STEP 2 EXAM?

8 A. YES.

9 MS. MEW: NBME MOVES TO ADMIT JX23 INTO
10 THE RECORD.

11 DR. KITCHENS: NO OBJECTIONS.

12 THE COURT: ADMITTED.

13 (DEFENSE EXHIBIT JX23 IS ADMITTED INTO
14 EVIDENCE.)

15 BY MS. MEW:

16 Q. AND WITH THE OUTCOME RECORDS, DR. JURICH, SO
17 JX19, JX20, JX21, JX22 AND JX23, ARE THEY BASED ON DATA
18 THAT IS CAPTURED DURING AN EXAMINEE'S TEST DAY
19 EXPERIENCE, HERE DR. KITCHENS?

20 A. YES.

21 Q. AND IT'S GATHERED AT THE TIME OF TESTING?

22 A. YES.

23 Q. IS THE DATA MAINTAINED BY NBME IN THE ORDINARY
24 COURSE OF ITS BUSINESS?

25 A. YES.

1 Q. LET'S GO BACK TO JX14, BACK TO THE TIMING
2 REVIEWS. I JUST WANTED TO WALK THROUGH THE INFORMATION
3 THAT IS SHOWN IN THIS, AND IF YOU CAN MAYBE GET IT SO WE
4 CAN SEE THE TABLE. THE WHOLE TABLE SO THAT THE TABLE --
5 THANK YOU.

6 MS. MEW: CAN EVERYONE SEE THIS OKAY, DR.
7 KITCHENS?

8 DR. KITCHENS: (DR. KITCHENS NODDED IN
9 THE AFFIRMATIVE.)
10 BY MS. MEW:

11 Q. COULD YOU START, DR. JURICH, BY JUST EXPLAINING
12 WHAT INFORMATION IS CONTAINED BY EACH OF THESE TABLE
13 HEADERS, THE LINE STARTING WITH, BLOCK?

14 A. YES. PERHAPS IT WOULD BE USEFUL IF I GO THROUGH
15 JUST BY COLUMN. THE BLOCK REFLECTS THE SEQUENCE OF THE
16 SECTIONS SEEN BY AN EXAMINEE. THE TYPE IS THEN THE TYPE
17 OF SECTION, AND YOU WILL SEE THREE DIFFERENT POTENTIAL
18 FIELDS THERE; TUTORIAL WHICH IS THE TUTORIAL WE
19 REFERENCED EARLIER; THE MULTIPLE CHOICE QUESTION BLOCKS,
20 WHICH IS A SET OF ITEMS; AND THEN BREAKS, IF AN EXAMINEE
21 HAS TAKEN A BREAK BETWEEN TWO QUESTION SECTIONS; THE
22 START TIME IS THE CALENDAR TIME WHEN THE EXAMINEE
23 STARTED THAT SECTION; THE END TIME IS THE CALENDAR TIME
24 WHEN THE EXAMINEE COMPLETED THAT SECTION; THE ALLOTTED
25 TIME IS THE TIME AN EXAMINEE IS ALLOWED TO SPEND WITHIN

1 THAT SECTION; THE UNUSED TIME REPRESENTS THE TIME THAT
2 THE EXAMINEE DID NOT USE FROM THE ALLOTTED TIME. AND
3 THEN THE ELAPSED DAYTIME IS THE COUNTER, IT'S THE TIME
4 THE EXAMINEE DID USE WITHIN THAT SECTION, SO ALLOTTED
5 TIME; THE AVAILABLE BREAK TIME AT END REPRESENTS HOW
6 MUCH BREAK TIME AN EXAMINEE HAD AT THE END OF THAT
7 PARTICULAR SECTION; AND THEN THE ELAPSE DAYTIME IS JUST
8 A TOTAL COUNT OF HOURS CUMULATIVE THROUGH THE EXAM --
9 TIME THROUGH THE EXAM. I SAID HOURS, OF COURSE IT COULD
10 BE MINUTES AS WELL; AND THEN THE END CLAUSE REPRESENTS
11 THAT THAT SECTION TERMINATED NORMALLY. AND IN THIS
12 CASE, NORMALLY INDICATES THAT THE SECTION ENDED BECAUSE
13 THE ALLOTTED TIME HAD EXPIRED OR THAT THE EXAMINEE HAD
14 CLOSED THE SECTION MANUALLY, INDICATING THEY ARE
15 COMPLETE WITH THAT SECTION.

16 Q. LET'S PULL UP JX19. IF WE CAN, AGAIN, MAYBE
17 LET'S LOOK AT THIS -- WELL, I THINK WE CAN START HERE.

18 CAN YOU EXPLAIN BY COLUMN, DR. JURICH,
19 WHAT INFORMATION IS CONVEYED IN THESE OUTCOME DATA
20 REPORTS?

21 A. SURE. THE EXAM IS THE STEP EXAMINE, TEST DATE
22 IS THE DATE THE EXAMINEE WAS ADMINISTERED THE EXAM.
23 SECTION AND ENCOUNTER ORDER REPRESENTS THE SEQUENCE IN
24 WHICH THE EXAMINEE SAW THAT BLOCK OF ITEMS THAT YOU WILL
25 RECALL FROM THE LAST DOCUMENT, THE ADMINISTRATION -- THE

1 ITEMS ARE ADMINISTERED IN SECTIONS THAT ARE TIMED
2 INDEPENDENTLY AND INDIVIDUALLY. SO THAT'S THE SEQUENCE
3 THEY SAW, THAT BLOCK OF ITEMS. AND THEN THE ITEM
4 SEQUENCE IS THE SEQUENCE THEY SAW THE ITEMS WITHIN THAT
5 SECTION. THE SCORE REPRESENTS ONE IF THEY GOT THE ITEM
6 CORRECT AND IT WILL TAKE A VALUE OF ZERO. IF THE
7 EXAMINEE GOT THE ITEM INCORRECT, THE RESPONSE IS THE
8 SPECIFIC LETTER THAT THE EXAMINEE SELECTED. AND I-TIME
9 REPRESENTS THE TOTAL AMOUNT OF TIME THE EXAMINEE SPENT
10 ON THAT ITEM.

11 Q. AND IF WE JUST SCROLL OUT A MINUTE SO WE CAN SEE
12 THE FULL PAGE.

13 AND SO IT LOOKS LIKE THIS RUNS
14 SEQUENTIALLY FROM SORT OF BLOCK TO BLOCK, IS THAT RIGHT?

15 A. BLOCK TO BLOCK, AND ITEM WITHIN BLOCK.

16 Q. WHILE WE ARE IN THIS DOCUMENT, IS THERE AN
17 AVERAGE LENGTH OF TIME FOR THE WAY THE TEST IS DEVELOPED
18 FOR EXAMINEES TO SPEND AN ON INDIVIDUAL TEST QUESTION?

19 A. AS I RECALL, EACH BLOCK IS GIVEN AN HOUR OR
20 60 MINUTES AND THERE ARE 40 ITEMS WITHIN EACH BLOCKS.
21 THEN THE AVERAGE AMOUNT OF TIME PER ITEM IS 90 SECONDS.
22 OF COURSE INDIVIDUAL ITEMS VARY AND HOW LONG THEY MAY
23 TAKE.

24 Q. HOW DOES THAT WORK OUT THEN IF THE INDIVIDUAL
25 ITEMS VARY THAT YOU GOT AN AVERAGE OF 90 SECONDS ACROSS

1 THIS SECTION?

2 A. ACROSS ALL OF THE ITEMS IN A SECTION, THE
3 AVERAGE LENGTH OF AN ITEM COULD BE AROUND 90 SECONDS.

4 Q. THEN LET'S GO BACK TO -- SO WE HAVE JX19 UP, AND
5 I WANTED -- AND THIS IS AGAIN FOR THE FEBRUARY 25, 2022
6 ADMINISTRATION OF STEP 1. I WANT TO ASK YOU ABOUT THE
7 DATA IN JX19 RELATIVE TO SOME TESTIMONY THAT DR.
8 KITCHENS HAS PROVIDED IN THIS LITIGATION.

9 SO IF WE CAN PULL UP DX3.

10 SO THIS IS A DECLARATION FILED ON
11 FEBRUARY 7, 2023, AND I WOULD LIKE TO GO DOWN TO
12 PARAGRAPH 35. I THINK WE CAN SHOW 35 AND 36 IF
13 POSSIBLE. I JUST WANT EVERYONE TO HAVE A CHANCE TO READ
14 IF THEY WANTED. PARAGRAPH 35 IN EXHIBIT DX3 IS FOR
15 CONTEXT, SO WE ARE TALKING ABOUT FEBRUARY 25, 2022 USMLE
16 STEP 1 EXAM.

17 AND THEN WE WILL SCROLL DOWN TO PARAGRAPH
18 36. CAN YOU SCROLL DOWN JUST A LITTLE BIT MORE SO WE
19 CAN SEE ALL OF THE PARAGRAPH?

20 SO THERE IS A DISCUSSION BY DR. KITCHENS
21 OF ONE OF HIS STRATEGIES THAT HE EMPLOYED TO ANSWERING
22 QUESTIONS ON THIS STEP 1 ADMINISTRATION. AND THEN AT
23 THE END, THE LAST SENTENCE, DR. KITCHENS WRITES, DESPITE
24 THIS APPROACH, AS I CAME TO THE END OF THE HOUR FOR EACH
25 BLOCK, I WOULD THEN RANDOMLY GUESS AT QUESTIONS UNTIL

1 THE CLOCK RAN OUT TO BE SURE NOTHING WAS LEFT BLANK.

2 SO NOW I WOULD LIKE TO LOOK BACK AT
3 EXHIBIT JX19.

4 DOES THE DATA THAT YOU HAVE REVIEWED IN
5 JX19 REFLECT THAT DR. KITCHENS WAS RANDOMLY GUESSING AT
6 QUESTIONS UNTIL THE CLOCK RAN OUT WHEN HE TOOK THE STEP
7 1 EXAMINATION IN FEBRUARY OF 2022?

8 A. NO, THE DATA IS NOT CONSISTENT WITH THAT
9 PARTICULAR STATEMENT AROUND RANDOMLY GUESSING TOWARDS
10 THE END.

11 Q. AND WHY IS THAT?

12 A. SO IN TYPICAL SITUATIONS WHERE THERE IS SPEEDED,
13 RUSHING AND GUESSING AT THE END, YOU WOULD SEE REALLY
14 TWO THINGS APPEAR IN THE DATA. FIRST IS THAT THE AMOUNT
15 OF TIME SPENT ON ITEMS AT THE END OF THE SECTION WHEN
16 TIME IS RUNNING OUT WOULD BE VERY MINIMAL; AND SECOND,
17 YOU WOULD SEE PERFORMANCE DECREASE AS YOU REACH THE
18 ITEMS WHERE THE EXAMINEE STARTS TO FEEL RUSHED.

19 IN THIS DATA, AND PERHAPS WE CAN ZOOM IN
20 A LITTLE ON THE END OF THIS SECTION TO DOWN HERE, THE
21 LAST TEN OR SO ITEMS, 30 THROUGH 40. YOU STILL SEE A
22 MEANINGFUL AMOUNT OF TIME SPENT ON THOSE ITEMS, SIMILAR
23 TO PREVIOUS ITEMS IN THAT SAME BLOCK. AND THE
24 PERFORMANCE IS ALSO RELATIVELY CONSISTENT WITH ITEMS IN
25 THAT SAME BLOCK.

1 Q. SO LET'S LOOK NOW AT BLOCK THREE. AND LET'S
2 ALSO LOOK AT ITEMS AROUND 30 TO 40 OR SO. YOU CAN KEEP
3 AS MUCH UP AS YOU CAN, JUST SO WE CAN SEE THE END OF
4 THREE. CAN YOU PULL IT OUT A LITTLE BIT, SO WE CAN SEE
5 -- THERE WE GO. OKAY.

6 AND HOW DOES THE DATA LOOK FOR THE END OF
7 BLOCK THREE, DR. JURICH?

8 A. IT REMAINS CONSISTENT. THE TIMING SEEMS TO BE
9 RATHER CONSISTENT THROUGHOUT THE BLOCKS WITH A
10 MEANINGFUL AMOUNT OF TIME SPENT AND SOME OF THE ITEMS
11 TOWARDS THE END OF THE SECTIONS AND PERFORMANCE ALSO
12 APPEARS CONSISTENT THROUGHOUT THE BLOCK.

13 Q. LET'S LOOK NOW AT BLOCK FOUR.

14 DOES THE DATA FOR BLOCK FOUR, IS IT
15 CONSISTENT OR -- WITH THE OTHER BLOCKS THAT WE HAVE
16 SEEN?

17 A. YES, IT'S CONSISTENT WITH THE PREVIOUS BLOCKS AS
18 WELL.

19 Q. AND THEN IF WE LOOK TO BLOCK FIVE.

20 IS THIS DATA CONSISTENT WITH WHAT WE HAVE
21 SEEN WITH PRIOR BLOCKS?

22 A. YES, IT LOOKS CONSISTENT.

23 Q. AND THEN IF WE GO TO BLOCK SIX.

24 IS THIS DATA GENERALLY CONSISTENT WITH
25 WHAT WE HAVE SEEN WITH THE OTHER BLOCKS?

1 A. YES, WE STILL SEE STANDARD VARIATION WITH THE
2 ITEM TIMES AND DOES NOT LOOK LIKE ANY CHANGE IN
3 PERFORMANCE TOWARDS THE END.

4 Q. AND THEN IF WE GO TO BLOCK SEVEN.

5 IS THIS DATA CONSISTENT WITH WHAT WE HAVE
6 REPORTED FOR BLOCKS ONE THROUGH SIX?

7 A. YES.

8 Q. AND THEN IF WE GO TO BLOCK EIGHT.

9 IS THIS DATA CONSISTENT FOR WHAT WE HAVE
10 REPORTED FOR OTHER BLOCKS?

11 A. YES.

12 Q. WE CAN TAKE THIS DOCUMENT DOWN.

13 AND I WILL NOW PULL UP EXHIBIT JX20.

14 SO WE HAVE IDENTIFIED THIS AS THE OUTCOME
15 DATA FOR THE MAY 9, 2022 STEP 1 EXAM. AND I WANT TO ASK
16 YOU A QUESTION ABOUT THIS DATA, AGAIN, AS IT RELATES TO
17 PRIOR TESTIMONY. SO IF WE CAN GO BACK TO DR. KITCHENS'S
18 FEBRUARY 7, 2023 DECLARATION AT DX3. IF WE CAN GO TO
19 PARAGRAPH 41.

20 I WANT TO FOCUS ON THE LAST SENTENCE OF
21 THIS PARAGRAPH. AND AGAIN, WITH RESPECT TO THE USMLE
22 STEP 1 MAY 29, 2022 EXAM.

23 IT READS, HOWEVER, I AGAIN RAN OUT OF
24 TIME AND WAS FORCED TO BEGIN GUESSING AT QUESTIONS
25 RANDOMLY UNTIL THE CLOCK RAN OUT TO BE SURE NOTHING WAS

1 LEFT BLANK.

2 SO IF WE CAN PULL UP JX20.

3 WHEN YOU LOOKED AT THE DATA FOR THE MAY

4 9, 2022 STEP 1 EXAM, DR. JURICH, DID IT APPEAR

5 CONSISTENT WITH THE STATEMENT THAT DR. KITCHENS RAN OUT

6 OF TIME AND WAS FORCED TO BEGIN GUESSING AT QUESTIONS

7 RANDOMLY UNTIL THE CLOCK RAN OUT TO BE SURE THAT NOTHING

8 WAS LEFT BLANK.

9 A. NO, IT DOES NOT APPEAR CONSISTENT WITH THIS TYPE

10 OF RANDOM GUESSING BEHAVIOR TOWARDS THE END OF THE

11 SECTION.

12 Q. LET'S LOOK AT THE END OF BLOCK TWO.

13 AND IS THAT YOUR IMPRESSION WITH RESPECT

14 TO THE END OF BLOCK TWO?

15 A. YES, THAT'S MY IMPRESSION. YOU STILL SEE THE

16 VARIATION IN THE MEANINGFUL TIME OF AMOUNT OF TIME SPENT

17 AT THE END, AND PERFORMANCE DOES NOT SEEM TO HAVE A

18 NOTICEABLE SHIFT.

19 Q. IF YOU LOOK TO BLOCK THREE.

20 IS THE PERFORMANCE HERE CONSISTENT WITH

21 WHAT YOU DESCRIBED WITH RESPECT TO BLOCK TWO?

22 A. YES.

23 Q. IF WE LOOK TO BLOCK FOUR.

24 IS THE PERFORMANCE CONSISTENT WITH WHAT

25 WE HAVE SEEN WITH RESPECT TO BLOCKS ONE AND TWO?

1 A. YES.

2 Q. IF WE LOOK AT BLOCK FIVE.

3 IS THE PERFORMANCE DATA CONSISTENT WITH
4 WHAT WE HAVE DESCRIBED FOR THE PRECEDING FOUR BLOCKS?

5 A. YES.

6 Q. IF WE LOOK TO BLOCK SIX.

7 IS THE OUTCOME DATA HERE CONSISTENT WITH
8 WHAT YOU HAVE REPORTED FOR THE OTHER BLOCKS?

9 A. YES.

10 Q. IF WE GO TO BLOCK SEVEN.

11 IS THE OUTCOME DATA HERE CONSISTENT WITH
12 WHAT YOU HAVE REPORTED FOR THE OTHER BLOCKS?

13 A. YES.

14 Q. AND THEN IF WE GO DOWN TO BLOCK EIGHT.

15 IS THE OUTCOME DATA FOR BLOCK EIGHT
16 CONSISTENT WITH WHAT YOU HAVE SEEN WITH THE OTHER
17 BLOCKS? AND MAYBE JUST FOR COMPLETENESS, REITERATE WHAT
18 THAT SHOWS, IF THAT'S THE CASE.

19 A. YES. THE DATA SUGGESTS RATHER CONSISTENT TIME
20 SPENT THROUGHOUT THE SECTIONS, INCLUDING IN THOSE AT THE
21 END OF THE BLOCK WHERE A MEANINGFUL AMOUNT OF TIME IS
22 SPENT ON THOSE ITEMS, AND THERE IS NOT A PARTICULARLY
23 NOTICEABLE PERFORMANCE CHANGE TOWARDS THE END OF A BLOCK
24 AS WELL.

25 Q. IF WE CAN PULL UP EXHIBIT JX15. THIS IS THE

1 TIMING REVIEW FOR DR. KITCHENS'S MAY 9, 2022 STEP 1
2 EXAM.

3 DOES THIS DATA REFLECT THAT DR. KITCHENS
4 RAN OUT OF TIME AND WAS FORCED TO BEGIN GUESSING AT
5 QUESTIONS RANDOMLY UNTIL THE CLOCK RAN OUT TO BE SURE
6 NOTHING WAS LEFT BLANK?

7 A. SO IN SOME INSTANCES, THIS DATA IS NOT
8 CONSISTENT WITH WHAT WE WOULD EXPECT UNDER THAT TYPE OF
9 BEHAVIOR. FOR EXAMPLE, UNDER BLOCK FOUR, FIVE, SEVEN
10 AND EIGHT, THERE WAS UNUSED BLOCK TIME, MEANING THE
11 EXAMINEE CLOSED THAT BLOCK WITH TIME STILL LEFT TO
12 REVIEW AND ANSWER ITEMS.

13 Q. CAN I ASK, IS IT COMMON OR NOT FOR EXAMINEES TO,
14 AS A GENERAL MATTER, RESOLVE THEIR TIME SO IN THE
15 SECTIONS WHERE THERE IS ZERO TIME REMAINING?

16 A. YES, EXAMINEES TEND TO USE ALL OF THEIR TIME.

17 MS. MEW: YOUR HONOR, I WAS GOING TO
18 START ON ANOTHER OUTCOME REVIEW. DO YOU WANT ME TO KEEP
19 GOING? I DON'T KNOW IF YOU HAD A HARD STOP AT 12:15.

20 THE COURT: THIS IS A GOOD TIME TO STOP,
21 SO LET'S TAKE A BREAK HERE. AND WE WILL RESUME AT
22 1 O'CLOCK. ALL RIGHT.

23 MS. MEW: DR. JURICH, JUST LOG BACK IN AT
24 1:00 OR A LITTLE BEFORE, THANK YOU.

25 THE COURT: ALL RIGHT. SEE YOU ALL THEN.

1 (LUNCHEON RECESS TAKEN.)

2 THE COURT: ALL RIGHT.

3 DR. KITCHENS, ARE YOU READY?

4 DR. KITCHENS: (DR. KITCHENS NODS HIS
5 HEAD IN THE AFFIRMATIVE.)

6 THE COURT: MS. MEW, I SEE YOU AND YOUR
7 WITNESS.

8 ARE YOU READY TO RESUME?

9 MS. MEW: I AM.

10 DR. JURICH, I DON'T SEE YOUR CAMERA, BUT
11 THERE HAVE BEEN THE ISSUES WHERE I AM THE -- DOES
12 EVERYONE ELSE SEE HIM?

13 THE COURT: BY THE WAY, I LEARNED A TRICK
14 ON ONE OF THE THINGS --

15 MS. MEW: NOW I CAN SEE HIM.

16 THE COURT: I HAVE BEEN DOING THIS, MS.
17 MEWS, THIS IS MY TRICK. I HAVE LEARNED THAT IF THERE IS
18 SOMEONE WHO I DEFINITELY WANT TO SEE, IF I RIGHT CLICK
19 ON THEIR PICTURE AND THEN I DO PIN FOR ME, THAT MAKES
20 THEIR CAMERA TURN ON, EVEN IF FOR SOME REASON IT WAS NOT
21 SHOWING THEIR CAMERA. I DON'T KNOW WHY THAT WORKED, BUT
22 IT WORKED.

23 MS. MEW: OKAY. WELL, YOUR HONOR, THIS
24 REMOTE STUFF -- OKAY.

25 THE COURT: YOU ARE FREE TO MOVE ON.

1 MS. MEW: THANK YOU.

2 BY MS. MEW:

3 Q. IF WE CAN NOW PULL UP EXHIBIT JX21. WE HAVE
4 PREVIOUSLY IDENTIFIED THIS AS THE OUTCOME DATA FOR
5 DR. KITCHENS'S SEPTEMBER 29, 2022 STEP 1 EXAM. AND I
6 WOULD LIKE TO ASK YOU A QUESTION ABOUT THIS DATA
7 RELEVANT TO ANOTHER STATEMENT IN DR. KITCHENS'S
8 FEBRUARY 7, 2023 DECLARATION. SO WE CAN PULL UP DX3
9 AGAIN. IF WE CAN SCROLL DOWN TO PARAGRAPH 47.

10 SO HERE IS WHERE DR. KITCHENS IS
11 DISCUSSING HIS SEPTEMBER 29, 2022 EXAM. AND IF YOU
12 COULD KEEP SCROLLING. GIVE EVERYONE A CHANCE TO READ
13 IT, I'M NOT GOING TO READ IT INTO THE RECORD. AND THEN
14 IF WE CAN SCROLL DOWN TO PARAGRAPH 48.

15 I WILL JUST READ THIS INTO THE RECORD.
16 MY RECOLLECTION IS THAT AT THE BEGINNING OF EACH BLOCK,
17 I WENT TO THE 21ST QUESTION PREEMPTIVELY AND MARKED ALL
18 OF THE QUESTIONS FROM 21 OF 40 OF EACH BLOCK WITH THE
19 SAME LETTER AS NOTED ABOVE, I BELIEVE C, FOR EACH
20 ENSUING ANSWER. THIS WAS TO ENSURE THAT NO QUESTIONS
21 WERE LEFT BLANK. IT PROBABLY TOOK ME TWO OR
22 THREE SECONDS PER QUESTION TO DO THIS.

23 THEN EVERYONE CAN JUST READ TO THEMSELVES
24 PARAGRAPH 49, JUST TO GET ORIENTED. AND THEN WE WILL GO
25 DOWN TO PARAGRAPH 50. AND THEN TO 51.

1 AND IF WE LOOK AT 51, SORT OF THE
2 CONCLUDING PART. IT SAYS, IN TOTAL, I ESTIMATE THAT I
3 WAS ABLE TO READ TO SOME DEGREE, APPROXIMATELY 200 OF
4 AFTER OF 320 QUESTIONS. IN SUM, THE REST OF THE ANSWERS
5 WERE FILLED IN WITH THE LETTERS C, WHICH HAD TO GIVE ME
6 20 PERCENT STATISTICAL CHANCE OF CORRECT ANSWERS ON
7 THOSE QUESTIONS I DID NOT HAVE SUFFICIENT TIME TO READ.

8 DR. KITCHENS: MS. MEW, FOR
9 CLARIFICATION, WHAT WAS THAT EXHIBIT NUMBER?

10 MS. MEW: DX3, DR. KITCHENS.

11 DR. KITCHENS: THANK YOU, MA'AM.

12 BY MS. MEW:

13 Q. MY QUESTION FOR YOU, IF WE GO BACK TO JX21,
14 PLEASE. DR. JURICH, IS LOOKING AT THE OUTCOME DATA FOR
15 DR. KITCHENS'S SEPTEMBER 29, 2022 STEP 1 EXAM.

16 DOES THE DATA REFLECT DR. KITCHENS'S
17 TESTIMONY INDICATING THAT APPROXIMATELY 120 OF ANSWERS
18 WERE FILLED IN WITH THE LETTER C?

19 A. HAVING SEEN THE TOTALITY OF THIS DATA BEFORE,
20 THE ANSWER -- THE RESPONSES SEEM MORE EVENLY
21 DISTRIBUTED, AND THERE DON'T SEEM TO BE A PREPONDERANCE
22 OF THE ANSWER C OR ANY SPECIFIC RESPONSE OPTION, SO NO,
23 THE DATA DOES NOT SEEM CONSISTENT WITH THAT DEGREE OF
24 SINGULAR RESPONDING.

25 Q. DID YOU ALSO LOOK AT THIS DATA, DR. JURICH, TO

1 SEE IF THERE WAS ANYTHING ABOUT THE TIMING AT THE END OF
2 THE EXAM THAT LOOKED DIFFERENT THAN THE TIMING FROM THE
3 BEGINNING?

4 A. YES. THE TIMING IS RELATIVELY CONSISTENT
5 THROUGHOUT THE EXAM.

6 Q. I WANT TO LOOK BACK AT DX3. IF WE LOOK TO
7 PARAGRAPH 42, THIS IS DISCUSSING DR. KITCHENS'S FIRST
8 ATTEMPT AT THE STEP 2 CK EXAM.

9 YOU JUST REMINDED ME, JUST FOR THE
10 RECORD, DR. JURICH, WHEN WE ARE TALKING ABOUT STEP 2
11 VERUS STEP 2 CK, ARE WE TALKING ABOUT THE SAME CASE?

12 A. IF IT'S REFERRING TO THE MULTIPLE CHOICE STEP 2
13 EXAM, THEN YES, THAT IS STEP CK EXAM AND ALL THE DATA
14 WE HAVE PRESENTED SO FAR IS IN REFERENCE TO THE STEP 2
15 CLINICAL COLLEGE FOR CK EXAM.

16 Q. SO THIS IS, AGAIN, DISCUSSING THE SEPTEMBER --
17 THE SEPTEMBER 29, 2022, STEP 2 CK. HOLD ON JUST ONE
18 MINUTE. STRIKE THAT. I AM GETTING -- OKAY. MY
19 APOLOGIES.

20 THIS IS IN REFERENCE TO THE MAY 28, 2022
21 STEP 2 CK. SO HERE, AGAIN, IF WE LOOK BACK AT PARAGRAPH
22 42. CAN YOU GO DOWN --

23 MS. MEW: I APOLOGIZE, DR. KITCHENS AND
24 THE COURT.

25 BY MS. MEW:

1 Q. IF WE CAN GO DOWN TO PARAGRAPH 43, I'M SORRY.
2 OKAY. ELECTRONICS.

3 LET'S START AGAIN. IF WE CAN GO BACK TO
4 PARAGRAPH 42 OF DX3. OKAY. SO THIS IS DISCUSSING THE
5 MAY 28, 2022 STEP 2 CK, AND WE ARE LOOKING MORE TOWARDS
6 THE MIDDLE OF THE PARAGRAPH. AND I AM LOOKING AT THE
7 SENTENCE WHERE IT SAYS, ACCORDINGLY, MY STRATEGY TO GET
8 THROUGH THE EXAM WAS UNAVAILING AND I WAS NOT ABLE TO
9 READ THROUGH A SIZEABLE PORTION OF VIGNETTES IN EACH
10 BLOCK.

11 SO NOW IF WE PULL UP JX16. THIS IS THE
12 TIMING REVIEW FOR THE MAY 28, 2022 STEP 2 CK.

13 AND MY QUESTION, DR. JURICH, IS DOES THIS
14 DATA SHOW, DID DR. KITCHENS HAVE ANY TIME LEFT FOR ANY
15 OF THE BLOCKS ON THIS TEST?

16 A. YES, THE UNUSED BLOCK TIME COLUMN SERVES AS A
17 REFERENCE. AND WE CAN SEE THE -- PARTICULARLY SECOND
18 FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH AND NINTH BLOCKS
19 HAD VARYING DEGREES OF UNUSED BLOCK TIME.

20 Q. WHAT WAS THE HIGHEST AMOUNT OF BLOCK TIME LEFT?

21 A. IT LOOKS LIKE ON BLOCK EIGHT, THERE IS TEN
22 MINUTES OF UNUSED TIME.

23 Q. IF WE PULL UP JX14 FOR THE FEBRUARY 25, 2022
24 STEP 1 EXAM.

25 DID DR. KITCHENS HAVE ANY BREAK TIME LEFT

1 AT THE END OF THE DAY?

2 A. YES, THE COLUMN AVAILABLE, BREAK TIME AT END, IS
3 THE REFERENCE POINT HERE. AND IF YOU SCROLL DOWN TO
4 BLOCK EIGHT, THE VALUE IN THAT CELL WILL SHOW YOU THAT
5 THE EXAMINEE HAD SIX MINUTES OF BREAK TIME REMAINING AT
6 THE END OF THE EXAM.

7 Q. IF WE LOOK AT JX15.

8 DID DR. KITCHENS USE ALL OF BREAK TIME
9 POTENTIALLY AVAILABLE TO HIM ON THIS EXAM FOR THE MAY 9,
10 2022 STEP 1?

11 A. NO, THERE IS 32 MINUTES LEFT OF BREAK TIME AT
12 THE END OF THIS EXAM.

13 Q. IF WE PULL UP JX16. THIS IS FOR THE MAY 28,
14 2022 STEP 2 CK EXAM.

15 DID DR. KITCHENS USE ALL OF THE BREAK
16 TIME AVAILABLE TO HIM?

17 A. NO, HERE THERE IS 50 MINUTES LEFT OF BREAK TIME
18 AT THE END OF THE EXAM.

19 Q. IF WE PULL UP EXHIBIT JX17. IS THIS FOR THE
20 JULY 29, 2022 STEP 2 CK EXAM.

21 DID DR. KITCHENS USE ALL OF THE BREAK
22 TIME AVAILABLE TO HIM?

23 A. NO. IN THIS INSTANCE THERE IS 23 MINUTES LEFT
24 OF BREAK TIME.

25 Q. AND IF WE PULL UP JX18. THIS IS FOR THE

1 SEPTEMBER 29, 2022 STEP 1 EXAM.

2 DID DR. KITCHENS USE ALL OF THE BREAK
3 TIME AVAILABLE TO HIM?

4 A. NO, THIS EXAMINATION ADMINISTRATION, THERE IS
5 20 MINUTES LEFT OF BREAK TIME BY THE END OF THE EXAM.

6 MS. MEW: THANK YOU, DR. JURICH.

7 I DO NOT HAVE ANY OTHER QUESTIONS, YOUR
8 HONOR.

9 THE COURT: ALL RIGHT. DR. KITCHENS,
10 READY FOR YOUR CROSS EXAMINATION?

11 DR. KITCHENS: YES, YOUR HONOR, I AM.

12 THE COURT: ALL RIGHT.

13 AND DR. JURICH, HAVE YOU EVER TESTIFIED
14 BEFORE? I CAN'T REMEMBER IF YOU SAID THAT.

15 THE WITNESS: I HAVE NOT.

16 THE COURT: OKAY. YOUR COUNSEL MAY HAVE
17 LAID THIS OUT FOR YOU -- IF THERE IS A WITNESS WHO IS
18 NOT AS QUITE AS EXPERIENCED, THIS MIGHT BE A LITTLE
19 UNUSUAL.

20 TO HELP GET THE CROSS FLOW IN A NICE WAY,
21 JUST BE AWARE THAT YOU ARE GOING TO BE ASKED SOME
22 QUESTIONS THAT ARE PROBABLY RELATIVELY NARROW QUESTIONS
23 AND IT'S APPROPRIATE TO GIVE AN ANSWER TO THOSE
24 QUESTION. AND YOU MAY IN YOUR MIND HAVE SOMETHING YOU
25 AS THOUGH YOU WOULD LIKE ADD THAT IS NOT THE QUESTION,

1 BUT SOMETHING THAT YOU WOULD LIKE TO ADD, WELL, IT'S THE
2 WHICH -- THE WAY TO HANDLE THAT IS TO NOT SAY THOSE
3 THINGS, AND WAIT FOR MS. MEW, IF SHE WISHES, TO ASK YOU
4 QUESTIONS ON REDIRECT. THAT'S A LEGAL QUESTION FOR HER
5 TO PUZZLE OUT, BUT YOUR JOB IS JUST TO ANSWER THE
6 QUESTIONS THAT YOU ARE ASKED, ALL RIGHT?

7 THE WITNESS: YES, YOUR HONOR, THANK YOU,
8 I UNDERSTAND.

9 THE COURT: WITH THAT, GO AHEAD, DR.
10 KITCHENS.

11 CROSS-EXAMINATION

12 BY DR. KITCHENS:

13 Q. GOOD AFTERNOON, DR. ALLEN. HOW ARE YOU?

14 A. I AM DOING WELL, THANK YOU.

15 Q. YOU'RE WELCOME.

16 SO DR. ALLEN, YOU ARE A PSYCHOMETRICIAN,
17 CORRECT?

18 A. THAT IS MY TRAINING, YES.

19 Q. AND EARLIER YOU SAID THAT -- YOU TESTIFIED THAT
20 YOU SPOKE WITH DIFFERENT STUDENTS REGARDING AROUND THIS
21 STEP EXAMINATIONS, CORRECT?

22 A. IN MY ROLE, I SOMETIMES MEET WITH STUDENTS ABOUT
23 USMLE ISSUES, YES.

24 Q. AND HOW MANY OF THOSE STUDENTS ARE INTERNATIONAL
25 MEDICAL GRADUATES OR FOREIGN MEDICAL SCHOOL STUDENTS?

1 A. IT WOULD BE DIFFICULT TO GIVE A PRECISE NUMBER,
2 BUT I HAVE MET WITH SOME INTERNATIONAL STUDENTS, YES.

3 Q. AND JUST FOR THE RECORD, I KNOW IT'S HARD TO
4 GIVE A PRECISE NUMBER, BUT JUST AN ESTIMATE, A
5 PERCENTAGE, OUT OF THE -- COMPARED TO THE AMERICAN --
6 WELL, AMERICAN-BASED STUDENTS?

7 A. SURE, SURE. TEN TO 15 PERCENT.

8 Q. ARE STATE MEDICAL SCHOOL BOARDS ABLE TO REVIEW
9 AN APPLICANT'S USMLE SCORE WHEN APPLYING FOR LICENSURE?

10 A. YES, THEY REVIEW THE TRANSCRIPT WHICH CONTAINS
11 THE PERFORMANCE ON USMLE EXAMS.

12 Q. DR. JURICH, ARE YOU FAMILIAR -- SORRY, I CALLED
13 YOU DR. ALLEN EARLIER. FOR THE RECORD, I AM SO SORRY
14 ABOUT THAT.

15 A. NO PROBLEM.

16 Q. ARE YOU FAMILIAR WITH THE CBSSA'S?

17 A. YES, THE COMPREHENSIVE -- THE ACRONYM IS ALWAYS
18 A BIT TRICKY, BUT THE COMPREHENSIVE BASIC SCIENCE
19 SELF-ASSESSMENT, YES.

20 Q. DO YOU DEVELOP THOSE QUESTIONS ON THAT
21 EXAMINATION?

22 A. THE NBME DEVELOPS THOSE QUESTIONS. I AM NOT
23 INVOLVED IN THAT EXAM.

24 Q. ISN'T IT TRUE THAT THE CBSSA IS DESIGNED
25 SPECIFICALLY FOR PEOPLE PLANNING ON TAKING THE STEP 1

1 EXAMINATION OR STEP 2 OR STEP 3? SORRY, THE STEP 1
2 EXAMINATION?

3 A. THE CBSSA, IN PARTICULAR, IS A READINESS
4 ASSESSMENT FOR STEP 1.

5 Q. IF WE CAN, CAN YOU PULL UP THE DOCUMENT EARLIER?

6 MS. MEW: YOUR HONOR, I AM JUST GOING TO
7 LODGE AN OBJECTION THAT IT IS OUT OF THE SCOPE OF THE
8 DIRECT.

9 THE COURT: DR. KITCHENS, I THINK YOU
10 APPRECIATE THAT IT IS NECESSARY TO KEEP THE SCOPE OF
11 YOUR QUESTIONS RELEVANT TO THE DIRECT. BUT I THINK YOU
12 ARE AWARE OF THAT, SO I WILL GIVE YOU SOME LEEWAY.

13 DR. KITCHENS: YES, YOUR HONOR. I'M
14 SORRY, I GUESS -- I WAS UNDER THE IMPRESSION THAT IN HIS
15 PARTICULAR ROLE THAT THAT WOULD HAVE ALSO BEEN PART OF
16 HIS JOB DUTIES, SO I APOLOGIZE FOR THAT.

17 THE COURT: NO, IT'S THAT IT MAY BE PART
18 OF HIS JOB DUTIES, BUT THE WAY CROSS EXAMINATION WORKS
19 IS YOU CROSS EXAMINE ON THE TOPICS THAT MS. MEW DID HER
20 DIRECT EXAMINATION ON.

21 TO BE FAIR, I THINK YOU DID LIST DR.
22 JURICH -- YOU LISTED ALL OF MS. MEW'S WITNESS AS
23 POTENTIAL WITNESSES IN YOUR CASE.

24 SO MS. MEW, I AM GOING TO GIVE HIM A
25 LITTLE LEEWAY IF HE WANTS TO DO A LITTLE BIT OF

1 EXPLORATORY DIRECT EXAMINATION ON SOME ISSUE, WITHIN
2 REASON. WE ONLY HAVE SO MUCH TIME.

3 GO AHEAD, DR. KITCHENS, JUST BASED ON HOW
4 THINGS HAVE BEEN GOING, I DON'T THINK IT'S GOING TO TAKE
5 TOO LONG.

6 GO AHEAD.

7 DR. KITCHENS: OKAY. THANK YOU.

8 BY DR. KITCHENS:

9 Q. CAN YOU PLEASE PULL UP THE DOCUMENT HERE,
10 PLEASE, NBME WEBSITE.

11 I AM SORRY, I'M TALKING TO MY WIFE.

12 YOU CAN SCROLL THROUGH IT, PLEASE, SO
13 THAT HE CAN SEE THE ENTIRE DOCUMENT.

14 DR. JURICH, CAN YOU SEE THE DOCUMENT HERE
15 ON THE SCREEN?

16 A. YES.

17 Q. AND CAN YOU SEE THE FIRST PARAGRAPH THERE?

18 A. YES.

19 Q. AND IF WE CAN HIGHLIGHT WHERE IT SAYS CBSSA'S,
20 PLEASE? AND ZOOM IN JUST A LITTLE BIT FOR OUR
21 CONVENIENCE.

22 CAN YOU PLEASE READ THE HIGHLIGHTED AREA?

23 A. SURE.

24 CBSSA RESULTS CAN BE USED IN CONJUNCTION
25 WITH OTHER INFORMATION TO ASSESS READINESS NOR THE

1 UNITED STATES MEDICAL LICENSING EXAMINATION, STEP 1,
2 ESPECIALLY WHEN THE SELF-ASSESSMENT IS TAKEN IN
3 CONDITIONS THAT MIRROR A STEP 1 ADMINISTRATION. FOR
4 EXAMPLE, STANDARDIZED FORMAT, TESTING IN ONE SITTING
5 WITH BRIEF BREAKS BETWEEN BLOCKS.

6 Q. OKAY. THANK YOU.

7 AND CAN YOU SCROLL DOWN WHERE IT SAYS,
8 UNDER THESE CONDITIONS, DO YOU SEE THAT?

9 MS. MEW: CAN I OBJECT? I DON'T WANT TO
10 MAKE THIS TOO DIFFICULT, BUT THIS IS A EXHIBIT -- ARE
11 YOU ASKING -- DO YOU HAVE A QUESTION FOR DR. JURICH THAT
12 YOU --

13 DR. KITCHENS: YES.

14 MS. MEW: OKAY.

15 THE COURT: GO AHEAD. DR. KITCHENS, GO
16 AHEAD.

17 DR. KITCHENS: THANK YOU.

18 BY DR. KITCHENS:

19 Q. DR. JURICH, CAN YOU PLEASE READ IN THE
20 HIGHLIGHTED AREA HERE?

21 A. SURE.

22 UNDER THOSE CONDITIONS, YOUR SCORE WOULD
23 FALL WITHIN FOUR POINTS OF THE REPORTED SCORE TWO THIRDS
24 OF THE TIME IT COULD BE FOUR POINTS LOWER OR HIGHER.

25 Q. AND CAN YOU SCROLL DOWN NOW TO WHERE IT SAYS, IF

1 THE CBSSA. CAN YOU READ THE HIGHLIGHTED AREA HERE?

2 A. IF YOU ARE A CBSSA, LIKELY SCORE RANGE IS
3 COMPLETELY ABOVE THE STEP 1 LOW/PASS RANGE, YOU ARE
4 LIKELY READY TO TAKE STEP 1.

5 Q. SO DR. JURICH, ISN'T IT POSSIBLE -- ISN'T IT
6 TRUE THAT IF A PATIENT -- I'M SORRY, A PATIENT. IF A
7 TEST TAKER PERFORMS THIS EXAM WITHIN A WEEK OF TAKING
8 THEIR STEP EXAMINATION THAT IT IS LIKELY THAT THEY WOULD
9 PASS THE EXAMINATION?

10 A. REFERENCING BACK TO THE DOCUMENT, THE PIECE I
11 READ, YES, UNDER THE CONDITIONS THAT THEY TOOK IT
12 SIMILAR TO THE WAY STEP 1 EXAM WOULD BE TAKEN.

13 Q. THANK YOU.

14 CAN WE PULL UP PX53, PLEASE?

15 CAN YOU SEE THE DATE AS INDICATED HERE?

16 AND CAN YOU READ THE SCORE THAT IT SAYS THERE?

17 A. YOU WOULD LIKE ME TO READ IT?

18 Q. YES, DID YOU RECOGNIZE -- YOU CAN SEE THE SCORES
19 THAT IS ON THERE, RIGHT?

20 A. YES.

21 Q. AND IF WE CAN SCROLL DOWN JUST A LITTLE BIT,
22 PLEASE, SO WE CAN SEE MORE OF THE DOCUMENT HERE.

23 BASED ON THE SCORE YOU SEE ON THE SCREEN,
24 ISN'T IT TRUE THAT THE EXAMINEE WOULD FEEL CONFIDENT IN
25 REGISTERING FOR THE EXAM?

1 MS. MEW: OBJECTION, YOUR HONOR.

2 DR. KITCHENS: CAN YOU SCROLL DOWN?

3 THE WITNESS: AM I ANSWERING THE
4 QUESTION?

5 THE COURT: I WAS NOT SURE IF DR.
6 KITCHENS WAS ABOUT TO REPHRASE.

7 DR. KITCHENS: YES.

8 BY DR. KITCHENS:

9 Q. DR. JURICH, ISN'T IT TRUE THAT IT COULD BE --
10 THAT THIS PARTICULAR -- ISN'T IT TRUE THAT THIS CBSSA
11 SCORE GIVEN WOULD GIVE SOME INDICATION THAT AN EXAMINEE
12 IS LIKELY TO PASS THE STEP 1 EXAMINATION GIVEN WITHIN
13 ONE WEEK?

14 A. AS NOTED, THERE ARE SEVERAL FACTORS THAT INCLUDE
15 WHETHER THERE WAS TAKEN IN A SIMILAR SETTING WITHOUT
16 USING MATERIALS, FOR EXAMPLE, AS THE STEP 1 EXAM. BUT
17 YES, IT WOULD INDICATE THAT THE STUDENT WAS READY HAD
18 THEY COMPLETED THIS UNDER A SIMILAR SETTING AS THE STEP
19 1 EXAM.

20 Q. AND --

21 A. SORRY, GO AHEAD.

22 Q. ALL RIGHT. IF I CAN, LET'S GO TO -- LET'S SEE
23 -- SORRY. FOR TIME SAKE AND FOR THE RESPECT OF THE
24 COURT, I WON'T GO TOO MUCH FURTHER IN THE CBSSA'S.

25 IF WE CAN PULL UP JX14, PLEASE.

1 DR. JURICH, DO YOU RECOGNIZE THIS
2 DOCUMENT?

3 A. YES.

4 Q. ISN'T IT TRUE THAT EXAMINEES MAY NOT USE ALL OF
5 THEIR BREAK TIME DURING AN EXAMINATION?

6 A. YES, THERE IS NO RULE THAT SAYS EXAMINEES MUST
7 USE ALL OF THEIR BREAK TIME, IT'S UP TO THE EXAMINEE.

8 Q. AND YOU TESTIFIED EARLIER THAT THE TIME FROM THE
9 TUTORIAL IS REFUNDED OR THEN USED FOR THE REGULAR TEST,
10 ISN'T THAT CORRECT?

11 A. THAT'S CORRECT.

12 Q. AND HOW MUCH TIME IS NORMALLY REFUNDED?

13 A. SO IT WILL BE THE AMOUNT OF TIME SPENT ON THE
14 TUTORIAL TAKEN AWAY FROM THE 15 MINUTES AND THEN THE
15 REMAINING TIME IS FED TO THE BREAK TIME IN PARTICULAR.
16 I DISTRIBUTE IT, JUST THE HELP.

17 IN THIS CASE IT WOULD BE THE 1442 OF
18 UNUSED BLOCK TIME IN THE TUTORIAL.

19 Q. WHAT IS THE MAXIMUM ALLOTTED TIME THAT A PERSON
20 IS ABLE TO BE REFUNDED?

21 A. 15 MINUTES.

22 Q. AND HOW MANY -- YOU SAID EARLIER THAT THE
23 ALLOTTED TIME FOR ME ON THIS -- ON THIS PARTICULAR
24 EXAMINATION IS 14.2, CORRECT, 14 MINUTES AND 42 SECONDS?

25 A. THAT'S THE UNUSED TIME FOR THE TUTORIAL.

1 Q. SO GIVEN THE INFORMATION YOU SAID BEFORE, I WAS
2 BEING GIVEN 14 MINUTES AND 42 SECONDS EXTRA ON --

3 A. RIGHT, ON BREAKS.

4 Q. CORRECT. THANK YOU.

5 AND LET'S SEE, IF WE CAN -- SORRY. ALL
6 RIGHT, AND IF WE COULD -- SCROLL DOWN JUST A LITTLE BIT.
7 YES. ALL RIGHT IF WE CAN NOW -- SCROLL DOWN, YES, HERE
8 WE ARE. THANK YOU.

9 DO YOU SEE USED TIME PER BLOCK THERE,
10 USED BLOCK TIME?

11 A. THE UNUSED BLOCK TIME COLUMN?

12 Q. YES, I'M SORRY. YES, UNUSED -- I'M SORRY,
13 UNUSED BLOCK TIME.

14 A. YES.

15 Q. AND CAN YOU SEE THE UNUSED BLOCK TIME THAT'S
16 GOING DOWN THAT COLUMN?

17 A. MM-HMM. YES.

18 Q. DO YOU SEE THAT IT'S FOR THE FIRST BLOCK IS
19 24 SECONDS LEFT?

20 A. YES, THE FIRST MULTIPLE CHOICE QUESTION, YES.

21 Q. AND THE MAJORITY OF -- IS IT SAFE TO SAY THAT
22 THE MAJORITY OF THE BLOCKS, THE TIME IS EXPIRED?

23 A. YES.

24 Q. CAN WE PULL UP DX3, PLEASE? AND ACTUALLY, LET'S
25 NOT PULL UP DX3 FOR NOW. HOLD ON. THANK YOU. AND YES,

1 LET'S PULL UP DX -- SORRY. LET'S SEE, GOT MY NUMBERS
2 MIXED UP HERE. YES, LET'S PULL UP DX3, PLEASE.

3 AND DO YOU RECOGNIZE THIS DOCUMENT
4 HERE -- AND FOR THE RECORD -- DR. JURICH?

5 A. YES.

6 Q. THIS HERE -- DX3 IS MY DECLARATION. IF WE CAN
7 ZOOM IN AND GO TO LINE 47, PLEASE.

8 MS. MEW: JUST SO THE RECORD IS CLEAR,
9 DR. KITCHENS, IS IT PARAGRAPH 47?

10 DR. KITCHENS: YES, PARAGRAPH 47.

11 BY DR. KITCHENS:

12 Q. AND FOR THE SAKE OF TIME HERE, WE KIND OF WENT
13 OVER IT EARLIER, SO WE WON'T NECESSARILY READ IT IN ITS
14 ENTIRETY?

15 WOULD YOU AGREE THAT THIS PARTICULAR
16 PARAGRAPH IS SAYING THAT I WAS NOT ABLE TO ANSWER ALL OF
17 THE QUESTIONS GIVEN IN THE BLOCK?

18 A. YES.

19 Q. AND THAT AT THE BOTTOM IT SAYS THAT I PUT A
20 SINGLE ANSWER LETTER, I BELIEVE IT TO BE C?

21 A. YES.

22 Q. THANK YOU.

23 CAN WE CLOSE OUT OF THAT AND PULL UP
24 JX18. LET ME SEE IF THIS IS THE CORRECT ONE HERE. YES,
25 SORRY, LET'S GO OUT OF THAT ONE. AND LET'S PULL UP

1 JX19. JX19.

2 DO YOU RECOGNIZE THIS DOCUMENT HERE? AND

3 JX19 IS MY FEBRUARY 25TH, STEP EXAMINATION FOR STEP 1?

4 A. YES.

5 Q. AND IF WE CAN ZOOM IN, PLEASE, ON THE COLUMNS OR
6 ZOOM IN HERE SO WE CAN SEE, YES, THANK YOU.

7 DR. JURICH, ISN'T IT TRUE THAT THE NBME
8 COLLECTS CHANGED ANSWER CHOICES SELECTIONS?

9 A. YES.

10 Q. ISN'T IT TRUE THAT I HAVE -- THAT I COULD HAVE
11 GONE BACK AND RANDOMLY GUESSED ON QUESTIONS THAT I WAS
12 NOT CONFIDENT ON?

13 A. YES.

14 Q. ISN'T IT TRUE THAT THIS INFORMATION IS NOT
15 INDICATED ON NEITHER OF THE DOCUMENTS SIMILAR TO THIS
16 THAT YOU TESTIFIED TO TODAY?

17 A. THE ANSWER CHOICE CHANGES ARE NOT INDICATED,
18 YES.

19 Q. YOU TESTIFIED ALSO EARLIER TODAY THAT YOU SPOKE
20 TO STUDENTS, AND JUST EARLIER HERE THAT YOU SPEAK TO
21 STUDENTS REGARDING DIFFERENT CAPACITIES FOR YOUR JOB.

22 WOULD THAT BEING SAID, ISN'T IT TRUE THAT
23 IT IS COMMON KNOWLEDGE FOR EACH EXAM OR EACH STEP EXAM
24 ADMINISTERED THAT EXPERIMENTAL QUESTIONS ARE CONTAINED?

25 A. YES.

1 Q. ISN'T IT ALSO POSSIBLE FOR A TEST TAKER TO
2 INTENTIONALLY DECIDE NOT TO INVEST A SIGNIFICANT AMOUNT
3 OF TIME ON QUESTIONS THEY DO NOT KNOW?

4 A. THAT WOULD BE SPECULATION ON MY PART.

5 Q. OKAY. SO GIVEN THE INFORMATION THAT THERE ARE
6 EXPERIMENTAL QUESTIONS THAT ARE ON THE EXAM, AND THAT
7 THOSE QUESTIONS ARE NOT GRADED AT ALL, COULD IT -- ISN'T
8 IT POSSIBLE THEN THAT A TEST TAKER COULD HAVE THIS
9 NOTION IN THE BACK OF THEIR HEAD WHEN SPENDING TOO MUCH
10 TIME ON ANY GIVEN ANSWER CHOICE OR ANY --

11 MS. MEW: OBJECTION, YOUR HONOR

12 DR. KITCHENS: -- QUESTION?

13 MS. MEW: I AM JUST OBJECTING BECAUSE IT
14 WAS TALKING ABOUT ANY EXAMINEE.

15 THE COURT: OKAY. YOU CAN ANSWER, DR.

16 JURICH.

17 THE WITNESS: I HAVE NOT HEARD THAT TYPE
18 OF BEHAVIOR DESCRIBED NECESSARILY BEFORE, BECAUSE IT IS
19 UNKNOWN WHICH ITEMS ARE EXPERIMENTAL.

20 Q. ISN'T IT TRUE THAT THIS INFORMATION IS NOT
21 INDICATED ON THE DOCUMENT WE SEE BEFORE US?

22 A. THE INFORMATION BEING WHICH INFORMATION?

23 Q. YES. SO WE WERE TALKING ABOUT THE -- SO ISN'T
24 IT TRUE THAT THE INFORMATION ON EXPERIMENTAL QUESTIONS
25 OF WHICH QUESTIONS WOULD BE -- I GUESS, WHICH LINE WOULD

1 BE EXPERIMENTAL QUESTIONS, ARE NOT ON THIS DOCUMENT?

2 A. YES, THAT'S NOT INDICATED. YES.

3 Q. ISN'T IT TRUE THAT THE NBME KEEPS RECORD OF
4 WHICH QUESTIONS ARE EXPERIMENTAL?

5 A. YES.

6 Q. AND ISN'T IT TRUE THAT THIS INFORMATION COULD BE
7 HELPFUL TO GIVE A CLEAR AND COMPLETE REPRESENTATION OF
8 THE DOCUMENT PUT BEFORE THE COURT TODAY?

9 MS. MEW: OBJECTION, YOUR HONOR.

10 THE COURT: OVERRULED.

11 YOU CAN ANSWER, IF YOU CAN.

12 THE WITNESS: THANK YOU, YOUR HONOR.

13 BECAUSE THE TIMING OF THE SECTION DOES
14 NOT INCORPORATE WHETHER AN ITEM IS EXPERIMENTAL OR NOT,
15 AND THEY ARE INTERSPERSED THROUGH SECTIONS EVENLY. AND
16 AGAIN, THE EXAMINEES DON'T KNOW WHETHER AN ITEM IS
17 EXPERIMENTAL. IT SHOULD NOT EFFECT THE PACING BEHAVIOR
18 AND THE PERFORMANCE OF THE EXAMINEE THROUGHOUT THE
19 SECTION.

20 SO IN THE CASE OF TALKING SPECIFICALLY
21 TOWARDS RAPID RESPONDING, GUESSING BEHAVIOR, I DON'T
22 THINK KNOWLEDGE OF THE EXPERIMENTAL DATA ADDS MUCH.

23 Q. ACCORDING TO WHAT WE READ ON THAT ON -- THAT
24 COUNSEL HAD YOU READ ON MY DECLARATION INDICATING THAT I
25 DID A SPECIFIC ANSWER OR MOVING FORWARD, WOULDN'T THAT

1 INFORMATION BE HELPFUL FOR US TO GIVE A CLEAR AND
2 PRECISE REPRESENTATION OF THE DOCUMENTS THAT WERE SHOWN
3 BEFORE THE COURT?

4 MS. MEW: I AM LOGGING THE SAME
5 OBJECTION.

6 THE COURT: YOU CAN ANSWER, PLEASE.

7 THE WITNESS: SORRY, YOUR HONOR.

8 THE COURT: GO AHEAD.

9 THE WITNESS: THANK YOU.

10 CAN YOU CLARIFY IN THIS INSTANCE OF WHAT
11 INFORMATION YOU ARE SPECIFICALLY REFERRING TO?

12 BY DR. KITCHENS:

13 Q. YES.

14 IF YOU CAN BRING THAT DOCUMENT BACK UP,
15 PLEASE.

16 DR. JURICH, DO YOU SEE WHERE IT SAYS,
17 RESP, MY RESPONSE?

18 A. YES.

19 Q. AND DO YOU SEE THOSE ARE -- WHAT IS THAT COLUMN
20 THERE, DR. JURICH?

21 A. THE OPTION SELECTED.

22 Q. THAT I --

23 A. FINAL OPTION SELECTED, YES, THAT THE EXAMINEE
24 SELECTED. IN THIS CASE, YOUR FINAL RESPONSE OPTION,
25 YES.

1 Q. AND THIS IS MY FINAL SELECTION, CORRECT?

2 A. YES.

3 Q. NOW, WOULDN'T IT BE HELPFUL FOR THIS COURT TO
4 HAVE A CLEAR AND ACCURATE REPRESENTATION OF THIS
5 DOCUMENT IF IT ALSO SHOWED THAT THERE WAS A COLUMN WHERE
6 I HAVE PICKED ANOTHER ANSWER CHOICE AND THEN CAME FOR
7 THE FINAL ANSWER CHOICE?

8 A. SO WOULD IT BE POSSIBLE TO REVIEW THE STATEMENT
9 AGAIN THAT YOU ARE REFERRING TO IN TERMS OF THE
10 BEHAVIOR?

11 I THINK MY ANSWER WOULD DEPEND UPON THE
12 STRATEGY THAT WAS DISCUSSED.

13 Q. IT'S NOT NECESSARILY ABOUT STRATEGY HERE. THE
14 QUESTION IS JUST, WOULD IT BE HELPFUL FOR THE COURT TO
15 BE ABLE TO SEE THAT THERE WAS POSSIBLY ANOTHER ANSWER
16 CHOICE THERE THAT WAS MY ORIGINAL RESPONSE, AND THEN
17 ALSO ALONG WITH THE ACTUAL FINAL RESPONSE?

18 A. IT COULD POTENTIALLY BE HELPFUL.

19 Q. OKAY. AND DR. JURICH, WHAT IS THE AVERAGE TIME
20 YOU SAID IS SPENT ON EACH QUESTION?

21 PLEASE BRING THAT DOCUMENT BACK. I WILL
22 TELL YOU WHEN TO REMOVE IT.

23 A. SO I DON'T HAVE THE AVERAGE TIME SPENT, BUT THE
24 AVERAGE TIME ALLOTTED BASED ON THE TIME ALLOTTED AND THE
25 NUMBER OF QUESTIONS IS ABOUT 90 SECONDS.

1 Q. 90 SECONDS?

2 A. ROUGHLY, YES.

3 Q. DO YOU SEE LINE -- WHERE IT SAYS ON ITEM
4 SEQUENCE NUMBER THREE?

5 A. YES.

6 Q. HOW MUCH TIME DID IT TAKE FOR ME TO ANSWER MY
7 FINAL RESPONSE ON THIS QUESTION?

8 A. TOTAL TIME SPENT ON THE TIME WAS 220 SECONDS.

9 Q. AND DO YOU SEE ITEM NUMBER FIVE?

10 A. YES.

11 Q. TIME SPENT ON THIS QUESTION WAS WHAT TIME? HOW
12 MUCH TIME BEFORE I HAD MY FINAL RESPONSE?

13 A. 136 SECONDS.

14 Q. CAN YOU GO TO SEQUENCE NUMBER TEN -- SORRY
15 NUMBER TEN.

16 WHAT TIME WAS SPENT ON THAT -- ON THAT
17 QUESTION THAT I GAVE MY FINAL RESPONSE?

18 A. 193.

19 Q. OKAY, .5, THANK YOU.

20 YOU CAN REMOVE THIS DOCUMENT HERE.

21 DR. JURICH, YOUR TESTIMONY TODAY, YOU
22 TALKED A LOT ABOUT TIMING, AND HOW MUCH TIME IT WOULD
23 TAKE FOR -- YOU KNOW, THAT IS ALLOTTED, AND HOW THIS IS
24 WHAT YOU DO, CORRECT, AS PART OF YOUR JOB?

25 A. YES.

1 Q. SO DR. JURICH, ONE THING THAT I WOULD LIKE TO
2 ASK YOU IS DOES ADDITIONAL TESTING TIME GIVEN TO A
3 QUALIFIED TEST TAKER ALTER OR CHANGE THE FUNCTION OF
4 YOUR USMLE EXAMINATION?

5 A. CAN YOU CLARIFY ALTER CHANGE?

6 MS. MEW: I AM NOT TRYING TO INTERRUPT.
7 I AM JUST OBJECTING TO THE FORM OF WHAT QUALIFIED TEST
8 TAKER MEANS.

9 THE COURT: DR. KITCHENS, COULD YOU
10 REPHRASE THE QUESTION?

11 DR. KITCHENS: YES, JUDGE.

12 BY DR. KITCHENS:

13 Q. IN ADDITION TO GIVING TEST -- ADDITIONAL TEST
14 TAKING TIME GIVEN TO A PERSON WHO IS GIVEN
15 ACCOMMODATIONS FOR EXTRA TEST TAKING TIME, WOULD IT
16 ALTER OR CHANGE THE FUNCTION OF THE USMLE EXAMINATION?

17 A. I APOLOGIZE, BUT I NEED VERIFICATION. I AM
18 ASKING FOR THE WORD FUNCTION OF THE USMLE. DO YOU MEAN
19 THE PURPOSE OF THE USMLE?

20 Q. WOULD IT CHANGE THE EXAM IN ANY WAY?

21 A. THE PURPOSE OF IT ALLOWING?

22 Q. IT'S A YES OR NO QUESTION, DR. JURICH, IF THAT'S
23 OKAY FOR TIME SAKE HERE.

24 WOULD IT CHANGE THE FUNCTION OR ALTER IN
25 ANYWAY THE EXAMINATION?

1 A. YES.

2 Q. CAN WE PLEASE PULL UP EXHIBIT 70, PLEASE.

3 AND DR. JURICH, BEFORE WE PULL UP
4 EXHIBIT 70, HOW WOULD IT ALTER OR CHANGE THE EXAM?

5 A. SO WHEN THE APPROPRIATE ACCOMMODATION IS GIVEN
6 AND JUSTIFIED, IT ALLOWS THE PERFORMANCE -- OR THE EXAM
7 ADMINISTRATION BECOMES MORE COMPARABLE IN TERMS OF
8 ADJUSTING FOR THAT ACCOMMODATION WHEN THE ACCOMMODATION
9 IS UNRELATED TO THE SKILLS BEING MEASURED IN THE
10 ASSESSMENT. SO IT ESSENTIALLY ALLOWS THAT INDIVIDUAL TO
11 TEST IN A MORE COMPARABLE SETTING AS THE STANDARD TIME
12 AND THE STANDARD CONDITIONS.

13 Q. SO IT DOES NOT ALTER OR CHANGE THE EXAMINATION,
14 CORRECT?

15 A. SO I THINK THIS NEEDS THE DISTINCTION.

16 SO IT ALTERS THE COMPARABILITY FOR THAT
17 EXAMINEE, BUT IT DOES NOT ALTER THE FUNCTION OR THE
18 ASSESSMENT OF THE EXAM.

19 Q. THANK YOU FOR THAT.

20 A. SORRY.

21 Q. THAT'S ALL RIGHT.

22 IF WE COULD PULL UP HERE EXHIBIT 70.

23 MS. MEW: AGAIN, JUST TO CLEAR THE RECORD
24 PX 17, DR. KITCHENS?

25 DR. KITCHENS: IF YOU CAN TAKE OFF THIS

1 DOCUMENT, PLEASE.

2 YOUR HONOR, I HAVE NO FURTHER QUESTIONS.

3 THE COURT: SURE.

4 MS. MEW, REDIRECT?

5 MS. MEW: I THINK I HAVE JUST A COUPLE.

6 REDIRECT EXAMINATION

7 BY MS. MEW:

8 Q. CAN WE PULL UP, I THINK IT WAS PX -- PX53,
9 PLEASE. THIS IS THE CBSSA SCORE REPORT FOR DR. KITCHENS
10 FOR FEBRUARY 14, 2022. AND IF WE CAN SCROLL DOWN, I AM
11 WANTING TO GET THE LANGUAGE AT THE BOTTOM AND THEN THE
12 TOP OF THE NEXT PAGE. THANKS.

13 DR. JURICH, IF YOU COULD READ FROM
14 BEGINNING WITH THE SECOND SENTENCE OF THAT PARAGRAPH
15 THROUGH THE END OF THE PARAGRAPH, PLEASE. SO STARTING
16 WITH, YOUR CBSSA SCORE.

17 A. SURE.

18 YOUR CBSSA SCORE REPRESENTS AN ESTIMATE
19 OF YOUR PERFORMANCE AS THE USMLE STEP 1. IF YOU HAVE
20 TAKEN BOTH THE EXAMS UNDER THE SAME CONDITIONS AND WITH
21 THE SAME LEVEL OF KNOWLEDGE. ESTIMATED PERFORMANCE
22 BASED ON TAKING CBSSA IS NOT A GUARANTEE OF YOUR FUTURE
23 PERFORMANCE ON STEP 1. MANY FACTORS, INCLUDING CHANGING
24 LEVELS OF KNOWLEDGE AND TESTING CONDITIONS MAY RESULT IN
25 A STEP 1 SCORE THAT IS HIGHER OR LOWER THAN YOUR

1 ESTIMATED SCORE.

2 Q. JUST AS A FOLLOW-UP QUESTION, IF ANYONE -- IF AN
3 EXAMINEE WERE TO TAKE THE SAME CBSSA FORM TWICE, WOULD
4 THE SECOND SCORE HAVE THE SAME OR ANY PREDICTABLE VALUE
5 WITH RESPECT TO SUBSEQUENT PERFORMANCE ON THE STEP 1
6 EXAM?

7 A. NO, BECAUSE THE SAME FORMS HAVE THE SAME ITEMS.
8 AND THE ANSWERS TO THE ITEMS ARE GIVEN TO STUDENTS AFTER
9 THEY COMPLETE A FORM. IT WOULD BE HIGHLY UNLIKELY THAT
10 KNOWING -- HAVING SEEN THOSE ITEMS BEFORE, THE FUTURE,
11 THE SECOND ATTEMPT WOULD BE A VALID REPRESENTATION OF
12 THE OVERALL CONTENT RATHER THAN JUST THE KNOWLEDGE OF
13 THE SPECIFIC ITEMS.

14 MS. MEW: I DO NOT HAVE ANY FURTHER
15 QUESTIONS.

16 THE COURT: ALL RIGHT.

17 DR. KITCHENS, DID YOU HAVE RECROSS FOR
18 THAT?

19 DR. KITCHENS: I HAVE ONE QUESTION, YOUR
20 HONOR.

21 THE COURT: ALL RIGHT.

22 RECROSS EXAMINATION

23 BY DR. KITCHENS:

24 Q. DR. JURICH, WOULD IT BE BENEFICIAL FOR AN
25 EXAMINEE WHO IS GETTING -- WHO IS PREPARING TO TAKE THE

1 STEP 1 EXAMINATION TO CHEAT ON THE CBSSA?

2 A. NO.

3 DR. KITCHENS: NO MORE FURTHER QUESTIONS,
4 YOUR HONOR.

5 THE COURT: OKAY. DR. JURICH I HAVE A
6 COUPLE QUESTIONS FOR YOU.

7 BY THE COURT:

8 Q. AND I AM GOING TO GIVE MYSELF A LITTLE LEEWAY
9 HERE. I HAVE LISTENED TO THIS WHOLE TRIAL AND THESE
10 QUESTIONS MIGHT NOT MAKE SENSE TO YOU, BUT THEY MAKE
11 SENSE TO ME.

12 DOES THE NBME, DO THEY EVER EXPUNGE TEST
13 RESULTS?

14 A. YES. THERE IS A PROCESS TO EXPUNGE TEST RESULTS
15 IN RARE CIRCUMSTANCES WHERE IS THE COMPUTER DELIVERY
16 METHOD HAS AN ERROR THAT AFFECTS THE RESPONSE TIME
17 ALLOTTED TO THE EXAMINEE OR THE ACTUAL OUTCOMES THAT
18 THEY HAVE PROVIDED.

19 Q. OTHER THAN A COMPUTER GLITCH, ARE YOU AWARE OF
20 ANYTIME NBME HAS EXPUNGED A TEST RESULT?

21 A. NO, I AM NOT AWARE.

22 Q. IS THERE EVER AN OCCASION WHERE NBME WHEN IT
23 PROVIDES A TRANSCRIPT HAS INCLUDED ANY EXPLANATORY
24 LETTER WITH THE TRANSCRIPT SPECIFIC TO THAT PARTICULAR
25 TEST TAKER?

1 A. I AM NOT FAMILIAR WITH ADDITIONAL SUPPLEMENTAL
2 LETTERS.

3 Q. OKAY. WHY IS -- IT'S A VERY GENERAL QUESTION,
4 BUT I AM JUST CURIOUS FROM YOUR POINT OF VIEW, YOUR
5 EXPERTISE THE ANSWER. WHY IS THE NBME EXAM TIMED? THE
6 USMLE, I SUPPOSE?

7 A. SURE, SURE. SEVERAL FACTORS I WOULD SAY. I
8 THINK ONE IS PRACTICALITY AND HAVING IT BE WITHIN A
9 CERTAIN SET AMOUNT OF TIME FOR EVERYONE. BECAUSE FOR
10 EQUITY PURPOSES, INDIVIDUALS WHO MAYBE DO NOT HAVE THE
11 RESOURCES TO SPEND, MORE ADDITIONAL TIME ON THE EXAM
12 MIGHT BE AN ADVANTAGE POTENTIALLY BY THAT AND
13 VISE-VERSA. AND SO IT ADDS THIS LEVEL OF
14 STANDARDIZATION AND COMPARABILITY, I THINK THAT WOULD BE
15 THE MAIN REASON I WOULD SAY IT'S TIME.

16 Q. IS PART OF WHAT THE USMLE IS TESTING, THE SPEED
17 AT WHICH A TEST TAKER CAN ACCOMPLISH ANSWERING THE
18 QUESTIONS?

19 A. NO, SPEED IS NOT A PART OF THE CONSTRUCT.

20 Q. HAVE YOU, I SUPPOSE, IN YOUR DUTIES AT NBME,
21 HAVE YOU EVER BEEN INVOLVED WITH USING THE PSYCHOMETRIC
22 DATA THAT YOU COLLECT TO STUDY THE EFFECTS OF
23 ACCOMMODATIONS?

24 A. NOT ME PERSONALLY, AND NOT THAT I AM AWARE OF.

25 Q. OKAY. THERE WAS ONE PART OF YOUR TESTIMONY I

1 REMEMBER I WROTE DOWN THE EXHIBIT NUMBER. WE DON'T HAVE
2 TO BRING IT UP, BUT IT WAS JX21, WHICH WAS ONE OF THE
3 ANSWER -- IT WAS A TABLE OF ANSWERS AND THE VARIOUS
4 AMOUNT OF TIME SPENT ON EACH ANSWERS, AND THEN IT ALSO
5 LISTED WHAT THE ANSWERS WERE.

6 SO A GENERAL QUESTION, WE DON'T NEED THE
7 EXHIBIT, BUT YOUR ANSWERED TO DO WITH THE PREPONDERANCE
8 OF THE C RESPONSE.

9 DO YOU REMEMBER THAT?

10 A. YES, SIR. YES, YOUR HONOR.

11 Q. I THINK THE QUESTION YOU WERE ASKED WAS
12 SOMETHING ALONG THE LINES, WELL, DO YOU SEE AN UNUSUAL
13 NUMBER OF C'S SOMETHING LIKE THAT. AND IN YOUR ANSWER
14 YOU WERE USING WORDS LIKE, WELL, IT SEEMS LIKE THERE IS
15 NOT AN UNUSUAL NUMBER OR C'S OR IT FEELS LIKE IT. AND
16 IT JUST RAISES A QUESTION IN MY MIND.

17 DID YOU TAKE THE STEP OF ACTUALLY
18 CALCULATING HOW MANY -- ADDING UP HOW MANY C'S THERE
19 WERE AND COMPARING IT TO WHAT WAS IN THE DECLARATION?

20 A. I DID, YOUR HONOR, AND THERE WAS ESSENTIALLY AN
21 EVEN NUMBER OF DISTRIBUTION BETWEEN THE FIVE PRIMARY
22 RESPONSES, A THROUGH E.

23 Q. OKAY. ALL RIGHT.

24 THE COURT: THOSE WERE MY QUESTIONS.

25 BUT IN THE SPIRIT OF FAIRNESS, DR.

1 JURICH, I LIKE TO GIVE THE LAWYERS A CHANCE TO ASK ANY
2 FOLLOW-UP TO MY QUESTIONS.

3 I WILL START WITH YOU, DR. KITCHENS,
4 ANYTHING?

5 DR. KITCHENS: NO FOLLOW-UP QUESTIONS,
6 YOUR HONOR.

7 THE COURT: ALL RIGHT.

8 MS. MEW?

9 MS. MEW: I JUST WANTED TO PASS ONE
10 FOLLOW UP, DR. JURICH.

11 FURTHER REDIRECT

12 BY MS. MEW:

13 Q. YOU MENTIONED STANDARDIZATION COMPARABILITY AS
14 SORT -- AND AGAIN, WE DON'T NEED TO START A WHOLE NEW
15 THING, BUT JUST WHAT DOES IT MEAN -- HOW DOES
16 STANDARDIZATION HELP WITH COMPARABILITY?

17 A. SURE. SO THE PROCESS OF STANDARDIZING DIFFERENT
18 COMPONENTS OF THE EXAM, FOR EXAMPLE, THE PROCEDURES, THE
19 LENGTH OF AN ASSESSMENT, THE TIMING. IT HELPS ENSURE
20 THAT THESE FACTORS, WHICH ARE UNRELATED TO WHAT IS BEING
21 MEASURED, ARE NOT INTRODUCING VARIATION IN PERFORMANCE.
22 SO THAT EXAMINEE'S ARE NOT UNFAIRLY ADVANTAGED OR
23 DISADVANTAGED BY HAVING DIFFERENT, FOR EXAMPLE, COMPUTER
24 SCREENS, AS ONE EXAMPLE. SO THAT IMPROVES THE
25 COMPARABILITY OF SCORES.

1 Q. AND THE TIME ELEMENT IS ALSO PART OF THAT?

2 A. YES, THE TIME ELEMENT IS PART OF THAT.

3 MS. MEW: I'M SORRY, NO FURTHER
4 QUESTIONS, YOUR HONOR.

5 THE COURT: I THOUGHT YOU WERE THINKING.

6 MS. MEW: I HAVE BEEN TAKING THESE
7 PAUSES.

8 THE COURT: DR. KITCHENS, DID YOU HAVE A
9 FOLLOW UP TO JUST THOSE QUESTIONS?

10 DR. KITCHENS: YES, YOUR HONOR, BECAUSE I
11 THOUGHT OF MY QUESTION AFTER YOU HAD ASKED ME.

12 FURTHER CROSS EXAMINATION

13 BY DR. KITCHENS:

14 Q. DR. JURICH, IS THE USMLE STEP EXAMINATION CLOSED
15 BOOK?

16 A. YES.

17 Q. AND SO IT IS CLOSED BOOK, IS THAT WHAT YOU SAID?

18 A. CLOSED BOOK. MEANING THERE IS NO MATERIALS
19 ALLOWED IN THE TESTING CENTER. IT IS JUST THE EXAMINEE
20 AND THE EXAM.

21 Q. AND ON A STANDARD EXAMINATION, A STUDENT WOULD
22 NOT BE ABLE TO GO HOME AND COME BACK, CORRECT, TO FINISH
23 THE EXAM?

24 A. NOT TO COMPLETE THE SAME ITEMS THEY WOULD HAVE
25 SEEN BEFORE.

1 Q. SO IF AN EXAMINEE IS ON A QUESTION FOR SAY FIVE
2 MINUTES AND THEY DON'T KNOW THE ANSWER BECAUSE THEY
3 DON'T ACTUALLY KNOW THE INFORMATION, IS IT SAFE TO SAY
4 THAT THEY WON'T NECESSARILY -- THAT THEY ARE NOT
5 NECESSARILY GETTING A FAIR ADVANTAGE BECAUSE THEY SPENT
6 FIVE MINUTES ON THAT QUESTION?

7 A. I GUESS I AM A LITTLE -- THE WORDS FAIR
8 ADVANTAGE IN THAT SENTENCE. CAN YOU CLARIFY?

9 Q. YES, I'M SORRY.

10 A. IT'S OKAY.

11 Q. IF AN EXAMINEE IS TAKING THE EXAM AND THEY ARE
12 AT THE PROMETRIC CENTER, AND THEY ARE ON A PARTICULAR
13 QUESTION FOR FIVE MINUTES, BECAUSE THEY WERE ON THAT
14 QUESTION FOR FIVE MINUTES LONG, DOES THAT GIVE ANY
15 INDICATION THAT THEY WILL SELECT THE CORRECT ANSWER?

16 A. NOT NECESSARILY, NO.

17 DR. KITCHENS: NO FURTHER QUESTIONS, YOUR
18 HONOR.

19 THE COURT: ALL RIGHT.

20 IN THAT CASE, DR. JURICH, THANK YOU FOR
21 YOUR TIME, YOU MAYBE EXCUSED.

22 THE WITNESS: THANK YOU, YOUR HONOR.

23 THE COURT: AND DOES THAT BRING US TO THE
24 END OF YOUR CASE, MS. MEW?

25 MS. MEW: YES, YOUR HONOR, NBME RESTS.

1 THE COURT: ALL RIGHT.

2 NOW, DR. KITCHENS, DO YOU HAVE IN MIND
3 ANYTHING FURTHER BY WAY OF REBUTTAL?

4 DR. KITCHENS: CAN YOU CLARIFY, YOUR
5 HONOR?

6 THE COURT: WELL, SO BASICALLY THERE IS
7 DIFFERENT WAYS TO DO THIS, OKAY, BUT FOR THIS PARTICULAR
8 TRIAL, IN MY MIND, IF YOU HAD IN MIND TO ADD ANYTHING
9 FURTHER, FOR INSTANCE, YOU COULD RECALL YOURSELF AS A
10 WITNESS IF YOU WANTED TO. IF YOU HAD IN MIND TO ADD
11 ANYTHING FURTHER, I WOULD ALLOW IT, BUT I WOULD BE
12 RESTRICTING TO YOU ISSUES THAT WERE REALLY -- THAT WERE
13 RAISED BY MS. MEW IN HER CASE THAT IN MY MIND I DON'T
14 THINK YOU HAD A FULL AND FAIR OPPORTUNITY TO ADDRESS IN
15 YOUR CASE AND CHIEF.

16 I DON'T WANT TO HEAR ANYTHING AGAIN. I
17 DON'T NEED THAT. BUT -- AND I WILL SAY, IF YOU WERE
18 THINKING THE ANSWER IS NO, I WAS GIVING SOME THOUGHT TO
19 ASKING YOU IF YOU WOULD BE WILLING TO TAKE THE STAND
20 AGAIN TO ADDRESS IN PARTICULAR DR. JURICH'S TESTIMONY
21 ABOUT -- WHERE HE WAS COMPARING YOUR DECLARATION TO DATA
22 THAT THEY HAD. AND IF YOU WOULD BE WILLING, YOU DON'T
23 HAVE TO, BUT IF YOU WOULD BE INTERESTED IN DOING THAT, I
24 WOULD ALLOW YOU TO TAKE THE STAND AND PROVIDE SOME
25 NARRATIVE TESTIMONY ON THAT ISSUE.

1 DR. KITCHENS: YES, YOUR HONOR, I WOULD
2 GREATLY APPRECIATE THAT.

3 THE COURT: ALL RIGHT.

4 MS. MEW, DO YOU HAVE ANY OBJECTION TO
5 THAT? I WILL HEAR IT IF YOU DO.

6 MS. MEW: NO, YOUR HONOR. I THINK I WILL
7 JUST SAVE IT FOR THE MERITS, SO HE CAN GO AHEAD.

8 THE COURT: SO DR. KITCHENS, IF YOU
9 DIDN'T HAVE ANY OTHER ISSUES TO RAISE WITH ME, I WELCOME
10 YOU TO RETURN TO THE STAND AND ADDRESS THAT PARTICULAR
11 QUESTION THAT I ASKED YOU, OKAY?

12 DR. KITCHENS: YES, YOUR HONOR.

13 THE COURT: WELL, THEN YOU CAN RESUME
14 TESTIMONY. YOU HAVE READY BEEN SWORN IN IN THIS CASE,
15 SO I WILL JUST REMIND YOU YOU ARE STILL UNDER OATH FOR
16 YOUR TESTIMONY.

17 DR. KITCHENS: YES.

18 YOU WOULD LIKE ME TO START NOW, YOUR
19 HONOR?

20 THE COURT: PLEASE.

21 DR. KITCHENS: SO IT WAS BROUGHT UP --
22 WHAT DR. JURICH WAS SAYING WAS THAT IN MY DECLARATION,
23 IT DID NOT CORRELATE WITH WHAT THE DOCUMENT THAT THEY --
24 THAT WAS PROVIDED BY THE NBME. THIS WAS SOMETHING THAT
25 I EVEN BROUGHT UP IN DISCOVERY THAT I FIGURED WOULD BE

1 AN ISSUE.

2 AND WHEN I AM LOOKING AT THE COLUMNS ON
3 THAT PARTICULAR DOCUMENT, IT WAS NOT A FAIR
4 REPRESENTATION. IT DIDN'T SHOW -- AND I WILL GIVE SOME
5 CONTEXT TO THAT, YOUR HONOR. THERE IS SO MANY -- THERE
6 ARE MANY DIFFERENT OTHER REPARABLE RESOURCES, SUCH AS
7 UWORLD, WHICH IS THE NUMBER ONE TEST PROGRAM THAT ALL
8 MEDICAL STUDENTS PARTICULARLY USES. THEY ARE SO
9 REPARABLE FOR JUST THAT ONE MONTH OF A SUBSCRIPTION FOR
10 THEM IS ROUGHLY \$250, FOR ONE MONTH SUBSCRIPTION.

11 AND EVEN ON THAT PARTICULAR PLATFORM THAT
12 THEY ARE SUPPOSED TO REPRESENT -- THIS PLATFORM
13 REPRESENTS LIKE THE ACTUAL USMLE. AND A LOT OF PEOPLE
14 MAKE SURE THAT THEY USE THIS ALONG WITH THE CBSSA'S.

15 BUT EVEN ON THAT PLATFORM, AFTER YOU
16 FINISH COMPLETING THAT BLOCK, IT WILL GIVE YOU FEEDBACK.
17 AND THAT FEEDBACK, WHAT IT WILL DO IS IT WILL TELL YOU
18 YOUR PERCENTAGE OF CORRECTNESS, YOUR PERCENTAGE OF
19 INCORRECTNESS, YOUR PERCENTAGE OF CHANGING YOUR ANSWER
20 FROM INCORRECT TO CORRECT, AND FROM CORRECT TO
21 INCORRECT.

22 WHAT THAT IS USED FOR IS SO THAT WE ARE
23 TRAINING OURSELVES, LISTEN, WHEN YOU PICK AN ANSWER,
24 STICK WITH WHAT ANSWER.

25 WELL, ON THIS PARTICULAR EXAMINATION

1 HERE, ON THE NBME ON THE DOCUMENT THAT YOU WAS GIVEN,
2 YOU WAS NOT ABLE TO SEE FULLY ANY OF THOSE ANSWER -- I
3 MEAN, THE OTHER ANSWERS THAT I EVEN CHOSE OR ALSO MY
4 THOUGHT PROCESS. AND EVEN IN THE THREE DIFFERENT TEST
5 PREP PROGRAMS THAT I -- THAT I PAID FOR TO INVEST IN
6 MYSELF TO MAKE SURE THAT I DO WELL. OVER \$4,000 OF THIS
7 TEST PREP, BECAUSE THAT WAS AN INVESTMENT.

8 THEY EVEN WOULD TEACH YOU THAT, LISTEN,
9 NO ONE KNOWS REALLY HOW MANY EXPERIMENTAL QUESTIONS, BUT
10 GIVE OR TAKE MAYBE OUT OF THE 280 QUESTIONS, MAYBE 80 OF
11 THEM ARE EXPERIMENTAL BECAUSE IT WOULD GIVE AN EVEN
12 NUMBER OF THE 200. AND SO BY LOOKING AT THAT -- AND
13 THEY WILL ALSO SAY, LISTEN, IF YOU GET ON A PARTICULAR
14 QUESTION AND IT JUST DOES NOT SEEM -- AND IT SEEMS KIND
15 OF FAR-FETCHED, DO NOT SPEND A LOT OF TIME ON IT,
16 BECAUSE IT COULD BE AN EXPERIMENTAL QUESTION, WHICH IS
17 THE REASON WHY, YOUR HONOR, YOU SAW ON SOME OF THOSE
18 QUESTIONS IT WAS VERY SHORT, 20 PLUS SECONDS, YOU KNOW,
19 OR 40 SECONDS. BECAUSE WHAT THAT DID WAS IT GAVE ME
20 TIME TO READ THROUGH IT REALLY QUICKLY, TO KIND OF SKIM
21 OVER THE INFORMATION THAT WAS GIVEN THERE, AND TO SAY TO
22 MYSELF, THIS DOES NOT REALLY SOUND PRACTICAL, OR DOES
23 NOT SOUND LIKE IT RELATES TO DAILY LIFE.

24 AND SO -- AND EVERYONE ALSO KNOWS THAT
25 THE USMLE SPEAKS AND TESTS ON TOPICS THAT ARE RELEVANT

1 TO TODAY'S TIME, AND ALSO TO TODAY'S PATHOLOGIES.

2 SO IF THERE WAS A QUESTION THAT SEEMED
3 LIKE IT WAS AN EXPERIMENTAL QUESTION, NO. I AM GOING TO
4 MOVE ON FROM IT. AND NOT ONLY THAT, WHEN I GO IN EVEN
5 ON MY CBSSA'S, I WILL GO THROUGH AND FROM A CERTAIN
6 POINT AND I WILL PUT ALL C'S DOWN. WE ARE TRAINED TO DO
7 THIS AS A TECHNIQUE, YOUR HONOR. THEY WOULD TEACH YOU
8 THAT THE FIRST THING THAT YOU DO WHEN YOU ARE LOOKING AT
9 THESE LONG PASSAGES IS TO READ THE ACTUAL QUESTION AT
10 THE BOTTOM FIRST SO THAT YOU KNOW IN YOUR MIND WHAT THEY
11 ARE GOING TO BE ASKING YOU ABOUT IN THE VIGNETTE SO THAT
12 YOU LOOK FOR IT.

13 SO WHEN YOU ARE GOING THROUGH THE
14 VIGNETTE, NOW YOU CAN KNOW WHAT KEY THINGS TO LOOK FOR.
15 AND THEN WHEN YOU GET TO YOUR ANSWER CHOICES, START FROM
16 THE BOTTOM AND THEN WORK YOUR WAY UP.

17 WHY IS THAT IS BECAUSE WE DON'T GO --
18 WHEN WE GO A, B, C, D, E, OUR ADRENALIN IS RUNNING, AND
19 IT GOES DOWN. SO IF YOU GO FROM BOTTOM TO TOP, IT SLOWS
20 YOU DOWN. AND MY COACH, DOCTOR -- I FORGET HER NAME.
21 IT'S A FOREIGN NAME. SHE IS THE DIRECTOR OVER PREP
22 EAGLE. SHE KNEW THAT I HAD MY -- THAT I HAD ADHD, AND
23 SHE PREPPED, GAVE ME TRAINING, ON HOW AS -- WITH ADHD,
24 HOW TO TAKE THESE EXAMS. AND THAT'S WHY SHE TOLD ME TO
25 START FROM THE BOTTOM AND GO UP, THAT WAY I CAN TRY TO

1 HELP CONTROL THOSE SYMPTOMS OF ADHD AND MY ANXIETY.

2 SO WHEN I GO TO THE END OF THE EXAM AND
3 PICK ALL C, THAT'S JUST BECAUSE ONCE TO TIMELINE GOES
4 OUT, THERE IS NO GOING BACK. SO IF YOU ARE FOCUSED ON
5 THAT QUESTION AND NOT NECESSARILY ON THE LINE THAT -- ON
6 THE TIME THAT'S GOING DOWN, IF YOU HAVE ANY BLANK
7 ANSWERS WHICH IS ON THE NBME'S WEBSITE, IT IS COUNTED
8 AGAINST YOU. UNLIKE A LOT OF OTHER TEST PROGRAMS OR
9 DIFFERENT BOARD EXAMS WHERE IF YOU DON'T ANSWER IT, IT
10 MAY NOT GO AGAINST -- IT'S BETTER TO LEAVE IT BLANK.

11 BY THE COURT:

12 Q. WELL, SO THE SUGGESTION -- FIRST OF ALL, LET ME
13 ASK THIS GENERAL QUESTION.

14 DO YOU STAND BY YOUR DECLARATION, YOU
15 STILL STAND BY THE STATEMENTS IN THE DECLARATION?

16 A. YES, I STAND BY THE DECLARATION THAT I DID NOT
17 HAVE ENOUGH TIME WHEN I WAS READING AND MY ANSWERS, YES,
18 YOUR HONOR.

19 Q. OKAY. THAT'S FIRST.

20 LET ME BREAK IT INTO TWO SUBQUESTIONS.

21 THE FIRST ONE IS, WITH RESPECT TO TIME,
22 DR. JURICH I UNDERSTOOD HIS TESTIMONY TO BE SUGGESTING
23 THAT YOU DID HAVE ENOUGH TIME TO ADDRESS ALL OF THE
24 QUESTIONS THE WAY YOU WANTED TO BECAUSE THE AMOUNT OF
25 TIME THAT YOU HAD -- AND SOMETIMES YOU HAD TIME LEFT

1 OVER AND OTHER TIMES THE TIME WAS SPREAD OUT EVENLY
2 AMONG THE QUESTIONS AND NOT JUST CRUNCHED AT THE BOTTOM.

3 IF I AM UNDERSTANDING YOUR TESTIMONY IT'S
4 THAT, WELL, I DIDN'T DO THE QUESTIONS IN ORDER, AND
5 THERE WERE SOME QUESTIONS THAT I PURPOSELY IGNORED. IS
6 THAT WHAT I AM UNDERSTANDING?

7 A. YES, YOUR HONOR. IT IS ALSO PART OF THE
8 TRAINING THAT YOU WILL FLAG THAT PARTICULAR QUESTION.
9 SO ON THE PLATFORM, THEY HAVE A BUTTON UP THERE THAT YOU
10 CAN HIT FLAG. AND ON THE SIDE IT HAS ALL OF THE
11 QUESTIONS -- I MEAN ALL OF THE NUMBERS 1 THROUGH 40.
12 AND IT WILL HAVE A DOT BESIDE IT IF IT HAS NOT BEEN
13 ANSWERED. AND IF I HAVE FLAGGED IT, YOU PUT A FLAG
14 THERE. THAT WAY YOU SKIP IT, MOVE ON AND THEN YOU CAN
15 GO BACK TO THAT PARTICULAR QUESTION.

16 Q. WHAT ABOUT THE LETTER C'S. DR. JURICH WAS
17 LOOKING TO SEE IF THERE WERE A PREPONDERANCE OF C'S IN
18 THERE, BUT HE DIDN'T SEE THAT.

19 HOW DO YOU EXPLAIN THAT?

20 A. YES. SO AGAIN, YOUR HONOR, IN THE DOCUMENTS
21 THAT WAS PROVIDED THERE, IT ONLY SHOWS THE ANSWERS THAT
22 WERE -- THAT WAS FINALIZED. AGAIN, WHEN I SAY THE C'S,
23 IT'S WHEN I GO THROUGH FIRST, PUT ALL OF THOSE C'S
24 THROUGH AND THEN AS I GET MORE TIME TO GO THROUGH, THEN
25 I WOULD CHANGE IT TO GET TO A PARTICULAR ANSWER THAT I

1 FELT WAS GOING TO BE THE RIGHT -- CORRECT ANSWER. AS I
2 STATED EARLIER, I WOULD GO FROM 20 DOWN AND HIT ALL C'S
3 JUST IN CASE I RUN OUT OF TIME BY NOT PAYING ATTENTION
4 TO IT, AND THE EXAM JUST CLOSES YOU OUT. AT LEAST I
5 HAVE SOMETHING THERE, I HAVE A CHANCE TO, YOU KNOW, GET
6 IN THE ANSWER CORRECT.

7 Q. SO THINKING ABOUT YOUR DESCRIPTION OF THIS, YOUR
8 TEST TAKING STRATEGY. IF YOU HAD EXTRA TIME, WHAT WOULD
9 YOU DO WITH IT? HOW WOULD YOU HELP YOU?

10 A. ONE, YOUR HONOR, IT WOULD NOT REQUIRE ME TO GO
11 THROUGH THE EXAM AND DO ALL OF THESE LITTLE EXTRA
12 THINGS, SUCH AS PUTTING C DOWN. AND ALSO IT WOULD NOT
13 -- IT WOULD ALSO HELP ME BE ABLE TO -- EVEN ON QUESTIONS
14 THAT I MIGHT NOT EVEN FEEL ARE EXPERIMENTAL QUESTIONS, I
15 WON'T HAVE THE PRESSURE THAT I HAVE TO SKIP IT, BECAUSE
16 IT JUST SEEMS TOO FARFETCHED, I WILL ACTUALLY HAVE TIME
17 TO FOCUS ON THE QUESTION AND HAVE A CHANCE TO SELECT THE
18 CORRECT ANSWER.

19 THE COURT: OKAY. THOSE ARE THE
20 QUESTIONS I HAD ABOUT DR. JURICH'S TESTIMONY, SO I
21 APPRECIATE YOU ANSWERING THOSE QUESTIONS.

22 ON THAT SAME TOPIC OF DR. JURICH'S
23 TESTIMONY, DID YOU HAVE ANYTHING ELSE YOU WANTED TO ADD?

24 DR. KITCHENS: YES, YOUR HONOR.

25 HE SPOKE ABOUT THE EXTRA BREAK TIMES AND

1 SUCH ON THOSE. AND THAT WAS ANOTHER STRATEGY THAT THEY
2 -- THAT EVERYBODY, IT IS PRETTY MUCH KNOWN THAT THE
3 TUTORIAL BREAK TIME, THAT TIME IS GIVEN TO YOU. SO IT'S
4 ALWAYS SUGGESTED THAT KNOW WHAT THAT TUTORIAL IS BEFORE
5 GOING INTO THE EXAM, WHICH YOU DO HAVE THAT OPPORTUNITY
6 BECAUSE ON THE NBME'S WEBSITE, THEY GIVE YOU THE
7 TUTORIAL SO YOU KNOW BEFORE YOU GO INTO THE TEST CENTER,
8 YOU KNOW HOW TO ANSWER WHAT THE DIFFERENT FUNCTIONS ARE,
9 WHICH IS ALL IN THAT TUTORIAL.

10 SO IMMEDIATELY THAT'S WHY YOU NOTICE,
11 YOUR HONOR, ON EACH AND LAST ONE OF THOSE I NEVER
12 REVIEWED THAT TUTORIAL TO GIVE ME EXTRA TIME THERE.

13 AND EVEN THEN AT THE END, THE MAJORITY OF
14 THE TIME WAS COMPLETELY EXPIRED BY THE END OF THE
15 COMPLETE EXAM. SO WITHOUT THAT, IT WOULD NOT BE ENOUGH
16 TIME.

17 THE COURT: ALL RIGHT.

18 MS. MEW, YOU HAVE THE OPPORTUNITY TO
19 CROSS-EXAMINE, IF YOU WOULD LIKE.

20 MS. MEW: I DON'T HAVE ANY MORE
21 QUESTIONS, YOUR HONOR, THANK YOU.

22 THE COURT: OKAY. UNLESS EITHER OF YOU
23 OBJECT, I AM GOING TO CALL THAT A CONCLUSION TO OUR CASE
24 TO THE TRIAL, OKAY.

25 DR. KITCHENS: NO OBJECTION, YOUR HONOR.

1 MS. MEW: NO OBJECTION.

2 THE COURT: THERE IS NO JURY, SO WE DON'T
3 HAVE ANYTHING CEREMONIAL, BUT THAT'S THE END OF THE
4 EVIDENTIARY RECORD FOR TRIAL.

5 DR. KITCHENS, YES.

6 DR. KITCHENS: YES, YOUR HONOR, AND MS.
7 MEW, I'M SORRY FOR MY IGNORANCE. I WAS NOT AWARE THAT I
8 SHOULD SUBMIT THE C.V. OF MY WITNESSES, WHICH I DID NOT
9 DO, INTO THE RECORD, JUST THEIR C.V.'S THAT WE
10 EXCHANGED.

11 THE COURT: WELL, I DON'T KNOW IF I NEED
12 THOSE. IT DIDN'T SURPRISE ME THAT MS. MEW DID THAT, BUT
13 I DON'T KNOW THAT THEY ARE GOING TO BE ANY PARTICULAR
14 RELEVANCE.

15 DR. KITCHENS: OKAY.

16 THE COURT: I DON'T THINK I NEED THOSE.

17 MS. MEW HAS ON THE DOCKET A CHALLENGE TO
18 ONE OF YOUR EXPERTS, DR. SENOGA, AND YOU WILL BE
19 RESPONDING TO THAT IN WRITING. AND IT WOULD NOT
20 SURPRISE ME -- HER C.V. IS PROBABLY IN MS. MEW'S MOTION,
21 I DON'T KNOW. I FORGET. SO THAT'S THE EXPERT WHERE THE
22 C.V. MIGHT BE RELEVANT, BECAUSE THERE IS A CHALLENGE
23 THERE, AND YOU WILL HAVE A CHANCE TO RESPOND TO THAT IN
24 WRITING.

25 OTHER THAN THAT, I AM NOT THAT WORRIED

1 ABOUT IT.

2 DR. KITCHENS: UNDERSTOOD, YOUR HONOR.

3 THE COURT: BECAUSE IT WAS LIVE TESTIMONY
4 FROM ALL OF THE WITNESSES ABOUT THEIR BACKGROUND AND SO
5 FORTH, AND THAT'S WHAT I WOULD LOOK TO. INTERPRETING AN
6 EXPERT'S C.V. WITHOUT HELP FROM THE WITNESS IS NOT EASY
7 ANYWAY.

8 DR. KITCHENS: YES, SIR.

9 THE COURT: LET'S PUT OUR LAWYER HATS ON
10 NOW AND TALK ABOUT WHAT IS GOING ON HAPPEN NEXT.

11 I HAD THOUGHT ABOUT HOW TO RUN THIS
12 TRIAL, AND I DECIDED A WHILE BACK TO HAVE POST TRIAL
13 BRIEFINGS, SO THAT'S THE WAY WE ARE GOING TO GO. IT IS
14 WORK FOR BOTH OF YOU, OF COURSE, BUT I THINK IT WILL
15 HELP US GET A LITTLE COMPLETE SET OF ARGUMENT THAT TAKES
16 EVERYTHING THAT WE HAD IN THIS TRIAL AND PUT IT SO YOU
17 CAN ARGUE IT THE WAY YOU WANT TO ARGUE IT TO ME.

18 I HAVE A DRAFT ORDER THAT I THINK I CAN
19 GET OUT TODAY THAT WILL GIVE YOU ALL THE TIMING AND
20 GUIDANCE, AND I WANT TO GO THROUGH IT TOGETHER. BECAUSE
21 THERE IS ARE SOME DATES ON THERE, I WANT TO MAKE SURE WE
22 ARE OKAY ON DATES, AND ALSO PROCEDURES, MAKE SURE THEY
23 MAKE SENSE TO YOU.

24 THE FIRST THING IS IF IT'S NOT SOMETHING
25 YOU HAVE ALREADY TAKEN CARE OF ALREADY, YOU NEED TO

1 ARRANGE WITH THE CLERK'S OFFICE TO ORDER A COMPLETE
2 TRIAL TRANSCRIPT SO MAKE SURE THAT WE HAVE THAT.

3 SECOND, FOR EXHIBITS, WE HAVE TALKED
4 ABOUT THIS A LITTLE BEFORE, BUT IT WILL BE IN THE ORDER.
5 YOU ARE GOING TO MEET AND CONFER AND AGREE ON A COMPLETE
6 LIST OF ADMITTED EXHIBITS. IF THERE IS ANY CORRECTIONS,
7 FOR EXAMPLE, TO MISIDENTIFIED STAMPS OR PAGES OR
8 SOMETHING LIKE THAT, MAKE THOSE CORRECTIONS. AND IF
9 THERE ARE ANY APPROPRIATE AGREED REDACTIONS FOR PERSONAL
10 IDENTIFYING INFORMATION THAT HAVE NOT BEEN MADE YET,
11 MAKE THOSE.

12 THEN NO LATER THAN JUNE 1ST, 2023, I WILL
13 MAKE THAT MS. MEW'S JOB. THE DEFENDANT SHALL FILE ON
14 THE DOCKET AND TRANSMIT TO US ELECTRONICALLY AT CHAMBERS
15 BY E-MAIL A COMPLETE SET OF EXHIBITS AND AN EXHIBIT
16 LIST. THE EXHIBIT LIST SHOULD BE ANOTHER THING THAT YOU
17 WORK ON TOGETHER. THE EXHIBIT LIST SHOULD HAVE
18 DESCRIPTIONS OF THE DOCUMENTS, THAT'S KIND OF OUR SHEET,
19 SO THAT WE CAN LOOK AT IT AND FIND THINGS.

20 IF THERE IS ANY DISPUTES ABOUT WHETHER
21 SOMETHING IS ADMITTED, YOU CAN BRING THOSE TO MY
22 ATTENTION, WE WILL GET THAT RESOLVED. IF IT'S A REAL
23 DISPUTE THAT AMONG THE THREE OF US WE REALLY CAN'T AGREE
24 ON IT, WHEN WE GET THE TRANSCRIPT WE WILL USE THAT TO
25 THE BEST OF OUR ABILITY. SO THAT'S EXHIBITS.

1 AND THIS ALL WILL BE WRITING.

2 FOR DEPOSITION DESIGNATIONS, IF YOU HAVE
3 NOT ALREADY, YOU SHOULD EXCHANGE THOSE DEPOSITION
4 DESIGNATIONS AND ANY RESPONSIVE COUNTER DESIGNATIONS AND
5 OBJECTIONS, AND THEN YOU SHOULD MEET AND CONFER TO
6 ELIMINATE AS MANY OF THOSE OBJECTIONS AS POSSIBLE. AND
7 THEN AGAIN ON THAT SAME DATE, JUNE 1ST, BY THEN
8 DEFENDANT SHALL FILE ON THE DOCKET THE DESIGNATIONS,
9 COUNTER DESIGNATIONS, OBJECTIONS AS WELL AS ANY OF THE
10 RELEVANT TRANSCRIPTS.

11 I KIND OF DOUBT GIVEN HOW WHAT HAPPENED
12 AT THE TRIAL, BUT IF THERE IS AN EXHIBIT THAT IS COMING
13 IN THROUGH A DEPOSITION, YOU SHOULD INCLUDE THAT AS
14 WELL.

15 IF IT'S TECHNICALLY PRACTICAL TO DO IT,
16 THE BEST WAY TO DO THIS IS FOR THE DEPOSITION TRANSCRIPT
17 TO BE MARKED UP WITH COLORED HIGHLIGHTING, YOU KNOW, SO
18 IT'S DESIGNATION IS YELLOW, COUNTER DESIGNATION IS BLUE,
19 AND THEN THE OBJECTIONS ARE IN COMMENT BUBBLES. THAT'S
20 A REALLY GREAT WAY TO DO IT FOR ME.

21 IF IT'S BURDENSOME, IF IT' JUST TOO
22 CUMBERSOME FOR YOU ALL TO WORK OUT, I WILL JUST TAKE THE
23 DESIGNATIONS, COUNTER DESIGNATIONS AND OBJECTIONS IN
24 WRITING AND THE TRANSCRIPTS ON THE SIDE. NOT AS GOOD,
25 BUT HAVING BEEN THERE, SOMETIMES THESE THINGS ARE VERY

1 HARD TO ARRANGE, SO I WILL LEAVE IT TO YOU.

2 THAT'S FOR THOSE FOR COMPLETING THE
3 RECORD.

4 FOR BRIEFING, WE ARE GOING TO DO THIS.
5 INSTEAD OF -- SOMETIMES PEOPLE DO BRIEFING AT THE SAME
6 TIME, BUT I AM NOT GOING TO DO THAT HERE BECAUSE IT'S
7 GOING TO BE LIKE SHIPS PASSING IN THE NIGHT.

8 I AM ACTUALLY GOING TO HAVE THE DEFENDANT
9 FILE A BRIEF FIRST, WHICH IS NORMALLY THE PLAINTIFF
10 WOULD GO FIRST, BUT I AM GOING TO HAVE THE DEFENDANT GO
11 FIRST HERE IN PART BECAUSE I WANT DR. KITCHENS TO KNOW
12 WHAT HE IS SHOOTING BACK AT. BUT I AM GOING TO MAKE IT
13 UP TO THE DEFENDANT BY GIVING THE DEFENDANT TWO BRIEFS
14 HERE INSTEAD OF -- SOMETIMES THE DEFENDANT WOULD ONLY
15 GET ONE.

16 SO THERE WILL BE A FIRST BRIEF FROM THE
17 DEFENDANT WITH PROPOSED FINDINGS OF FACTS AND
18 CONCLUSIONS OF LAW, AND I HAVE THAT ONE TARGETED FOR
19 JUNE 15TH. AND SO THAT GIVES YOU A HEALTHY AMOUNT OF
20 TIME FROM NOW, AND ALSO TWO WEEKS FROM THE TRANSCRIPT SO
21 YOU CAN GET YOUR CITATIONS AND SO FORTH IN.

22 AND LET ME GIVE YOU ALL THE DATES, AND
23 THEN WE CAN TALK ABOUT THE DATES.

24 THEN I HAVE FOR DR. KITCHENS A RESPONSIVE
25 BRIEF AND PURPOSED FINDINGS OF FACT IN THAT RESPONSIVE

1 BRIEF ON JULY 6TH. THEN DEFENDANT GETS A SECOND BRIEF
2 ON JULY 20TH, AND PLAINTIFF GETS A FINAL BRIEF ON
3 AUGUST 3RD. SO IT WOULD BE FOUR BRIEFS, TWO FOR EACH
4 SIDE, THE DEFENDANT GOING FIRST, LAID OUT FROM JUNE 15TH
5 TO AUGUST 3RD.

6 I KNOW IT'S SUMMERTIME, BUT I AM
7 SENSITIVE TO THE INTEREST -- THE IMPORTANT INTEREST OF
8 MAKING FORWARD PROGRESS AS WELL.

9 SO THOSE DATES, SINCE WE ARE ALL HERE
10 TALKING ABOUT IT, I MIGHT AS WELL ASK. IS ANYONE ON A
11 CRUISE SHIP ON ONE OF THOSE DAYS?

12 MS. MEW: I MISSED THE -- SO DEFENDANT IS
13 JUNE 15TH, PLAINTIFF'S RESPONSE JULY 6TH AND THEN
14 JULY 20TH.

15 THE COURT: AND THEN PLAINTIFF COMES BACK
16 AUGUST 3RD.

17 MS. MEW: OKAY. YOUR HONOR, MAY I ASK,
18 ARE YOU THINKING OF -- WHAT YOU ARE ENVISIONING, BECAUSE
19 YOU ARE TALKING ABOUT A BRIEFING -- LIKE BRIEFING, A
20 BRIEF AND THEN PROPOSED FINDINGS OF FACT AND CONCLUSIONS
21 OF LAW? WHAT ARE YOU ENVISIONING?

22 THE COURT: SINCE YOU ARE GOING FIRST,
23 MS. MEW, YOU ARE GOING TO GET TO SET THE TONE HERE. BUT
24 I THINK WHAT WILL PROBABLY MAKE SENSE ARE PROPOSED
25 FINDINGS OF FACT, NUMBERED PROPOSED FINDINGS OF FACT

1 WITH CITATIONS AFTER THEM, AND THEN CONCLUSIONS OF LAW
2 IN YOUR ARGUMENT BELOW THAT.

3 I WAS GOING TO SET THE PAGE LIMIT FOR THE
4 FIRST TWO BRIEFS AT EITHER 50 PAGES OR 17,500 WORDS. A
5 BIG TRIAL, A LOT OF GOING ON, SO I WILL GIVE YOU PLENTY
6 OF SPACE. AND THEN THE SECOND ROUND I WILL CUT IN HALF
7 TO 25 PAGES OR 8,750 WORDS.

8 AND SO, DR. KITCHENS, MS. MEW, FOR
9 OPENING BRIEF, WILL HAVE NUMBERED FACT FINDINGS THAT
10 DEFENDANT IS PROPOSING THAT I MAKE, THAT I ADOPT THOSE
11 AS MY FACT FINDINGS WITH CITATIONS TO THE RECORD. WHEN
12 YOU RESPOND. YOU WILL RESPOND TO THOSE FACT FINDINGS.
13 YOU WILL SAY, I DISAGREE, AND HERE IS THE COUNTER CITE
14 OR WHATEVER IT IS. AND YOU WILL ALSO PROPOSE YOUR OWN
15 FACT FINDINGS.

16 I MAY, IN MANY CASES, MAY ADOPT SOMEONE'S
17 FACT FINDINGS, BUT IN OTHERS I MAY MAKE MY OWN. BUT
18 IT'S USEFUL EXERCISE FOR YOU BOTH TO DO THAT AND GETS
19 YOU FOCUSED ON WHAT EXACTLY IS IN THE RECORD, AND IT
20 WILL HELP ME AS WELL.

21 THEN THE REPLY AND SUR-REPLY BRIEFS, THE
22 LAST TWO BRIEFS PROBABLY ALL HAVE ADDITIONAL PROPOSED
23 FACT FINDINGS OR ANYTHING LIKE THAT, ALTHOUGH MS. MEW
24 WILL NEED TO RESPOND TO ANY FACT FINDINGS YOU PROPOSE,
25 DR. KITCHENS, SO SHE CAN DO THAT. BUT THEN BEYOND THAT

1 IT WILL BE MORE ADDITIONAL ARGUMENT THAT IS WHAT WILL BE
2 IN THOSE LATTER TWO BRIEFS, FOR THE MOST PART, OKAY.

3 MS. MEW: YOUR HONOR, I'M SORRY.

4 THE COURT: GO AHEAD.

5 MS. MEW: I THINK MAYBE BECAUSE I AM NOT
6 -- THE SUR-REPLY -- FOR THERE TO BE FOUR ROUNDS OR FOR
7 IF PLAINTIFF TO GET TWO OPPORTUNITIES --

8 THE COURT: PLAINTIFF WOULD NORMALLY GET
9 TWO, IF THE PLAINTIFF GOES FIRST. I AM TRYING TO STRIKE
10 A BALANCE HERE. I AM LETTING THE DEFENDANT GO FIRST,
11 WHICH NORMALLY I WOULD NOT DO BUT I AM DOING HERE
12 BECAUSE ONE OF THE THINGS YOU WILL DO IS SET OUT A
13 STRUCTURED LEGAL FRAMEWORK FOR THE REASONS YOU THINK THE
14 DEFENDANTS SHOULD PREVAIL, AND MAKE SURE DR. KITCHENS
15 CAN FULLY RESPOND TO THAT. HE WILL RESPOND ON THE SAME
16 LEGAL FRAMEWORK THAT YOU HAVE SET FORTH, AND I WANT
17 THAT. I WANT TO HAVE THAT FROM HIM.

18 AND THEN IN ORDER TO MAKE -- I THINK IN
19 MY MIND IN ORDER TO KIND OF EVEN THE SCALES THERE, I
20 WANT TO MAKE SURE THE PLAINTIFF -- THAT DR. KITCHENS HAS
21 TWO BRIEFS, THAT'S WHY I LANDED ON THAT. IT'S NOT A
22 PERFECT SYSTEM, BUT TO ME IT BALANCES THE CHANCE FOR
23 EVERYONE TO BE HEARD AND ALSO TO GIVE ME THE MOST HELP I
24 CAN GET.

25 I AM GOING TO LAYOUT IN THE ORDER -- IT'S

1 NOT QUITE FINISHED. BUT I AM GOING TO LAYOUT IN THE
2 ORDER -- I WILL JUST READ IT.

3 IT'S GOING TO SAY, IN THE BRIEFING, THE
4 PARTIES SHALL PROPOSE THE FACT FINDINGS AND ADDRESS
5 LEGAL ARGUMENTS FOR AT LEAST THE FOLLOWING ISSUES, BUT
6 MAY ADDRESS OTHER ISSUES IF THEY BELIEVE IT IS NECESSARY
7 FOR THE COURT TO CONSIDER THEM.

8 SO I DON'T WANT TO -- IF I ORDER YOU TO
9 ONLY ADDRESS CERTAIN ISSUES, I WOULD BE BY IMPLICATION,
10 LIKE, I DON'T KNOW, SORT OF LIMITING YOUR CASES, RIGHT,
11 AND I DON'T WANT TO DO THAT. SO YOU BRIEF WHAT YOU FEEL
12 LIKE WHAT YOU FEEL LIKE YOU NEED TO BRIEF TO HAVE IN THE
13 RECORD OF THE CASE. HOWEVER, I AM GOING TO GIVE YOU
14 SOME GUIDANCE TO MAKE SURE I GET WHAT I THINK I NEED.
15 MAYBE YOU WILL CONVINCE ME I NEED SOMETHING DIFFERENT.
16 AND THE QUESTIONS ARE, I WILL GO THROUGH THEM, I AM
17 STILL WORKING ON THIS, BUT THE FIRST QUESTION IS GOING
18 TO BE BASED ON THE ENTIRE EVIDENTIARY RECORD, INCLUDING
19 THE TRIAL RECORD, DOES DR. KITCHENS HAVE A MENTAL
20 IMPAIRMENT THAT SUBSTANTIALLY LIMITS HIS ABILITY TO
21 PERFORM ONE OR MORE MAJOR LIFE ACTIVITIES THAT ARE
22 RELEVANT TO TAKING THE USMLE AS COMPARED TO MOST PEOPLE
23 IN THE GENERAL POPULATION.

24 THAT TRACKS PRETTY WELL DR. KITCHENS'S
25 FIRST QUESTION IN THE PRETRIAL ORDER.

1 THE SECOND QUESTION IS GOING TO BE, HOW,
2 IF AT ALL, IS THE ANALYSIS FOR QUESTION ONE DIFFERENT IF
3 THE EVIDENCE IS LIMITED TO THE DOCUMENTATION THAT DR.
4 KITCHENS PROVIDED TO NBME WHEN HE MADE HIS REQUEST FOR
5 EXTRA TESTING TIME. SO THAT WILL GIVE BOTH MS. MEW AN
6 OPPORTUNITY TO DRAW THAT DISCONTINUING, AND GIVE ME
7 ARGUMENTS BASED ON THE FULL EVIDENTIARY RECORD AND THE
8 LIMITED ONE; AND ALSO DR. KITCHENS TO DO THE SAME THING,
9 SO I CAN KIND OF -- THOSE ARGUMENTS ARE GOING TO BE
10 SLIGHTLY DIFFERENT.

11 QUESTION THREE IS GOING TO BE A LEGAL
12 QUESTION. SITTING HERE, I HONESTLY DON'T KNOW THE
13 ANSWER FOR YOU. I TRIED TO LOOK INTO IT MYSELF BUT I
14 NEED BRIEFING.

15 QUESTION THREE, AS A MATTER OF LAW, IS
16 THE RELEVANT TIME FRAME FOR EVIDENCE THE PRESENT, AS IN
17 MY QUESTION ONE, OR THE PAST AS IN MY QUESTION TWO; OR
18 DOES THE ANSWER DEPEND ON WHETHER THE REMEDY IS
19 EXPUNGEMENT OF PAST RESULTS OR A FUTURE ACCOMMODATION.

20 SO I JUST DON'T KNOW THE ANSWER TO THAT
21 NOW. SO I AM GOING TO GIVE YOU THE OPPORTUNITY TO BRIEF
22 THAT AS A QUESTION OF LAW TO ME AS WELL.

23 THEN QUESTION FOUR I HAVE DOWN AS, IF THE
24 ANSWER TO ONE OF THESE -- TO QUESTION ONE, LET'S SAY IS
25 YES, IS DOUBLE TESTING TIME OR ANY OTHER ACCOMMODATION

1 RELEVANT TO THE RECORD IN THIS CASE, BECAUSE I MAY HAVE
2 MISSED SOMETHING, A REASONABLE ACCOMMODATION? OKAY. WE
3 CAN DISCUSS THAT.

4 AND THEN THAT'S KIND OF THE FIRST CHUNK.

5 THE SECOND CHUNK IS IF THE ANSWERS TO
6 THOSE TO QUESTIONS -- YOU MIGHT NOT REMEMBER WHICH
7 QUESTION IS WHICH. BUT IT SAYS, IF THE ANSWERS TO
8 QUESTIONS ONE AND FOUR ARE YES, MEANING I BASICALLY FIND
9 IN DR. KITCHENS'S FAVOR ON THE ADA QUESTION, ARE THERE
10 ANY REASONS WHY THE COURT SHOULD NOT ISSUE AN INJUNCTION
11 ORDERING THE NBME TO ACCOMMODATE DR. KITCHENS
12 ACCORDINGLY ON A FUTURE TEST.

13 SO I PUT THAT IN THERE. OBVIOUSLY IT'S A
14 MORE FOR MS. MEW, BUT IF I FIND FOR DR. KITCHENS ON THE
15 ADA QUESTIONS, I MEAN, IN MY MIND, I AM LIKE, OKAY, TIME
16 FOR AN INJUNCTION. BUT I WANT TO GIVE ME MS. MEW A
17 CHANCE TO TELL ME, WAIT, HOLD ON, THERE ARE SOME OTHER
18 THINGS YOU NEED TO THINK ABOUT, SO I JUST PUT THAT OUT
19 THERE.

20 THEN QUESTION SIX AND SEVEN BOTH HAVE TO
21 DO WITH EXPUNGEMENT, OKAY. AND FOR BOTH QUESTIONS SIX
22 AND SEVEN, THEY START OUT BY SAYING, ONLY IF YOU HAVE
23 SOMETHING FURTHER TO ADD TO YOUR PRETRIAL BRIEFING. SO
24 IF YOUR PRETRIAL -- YOU DON'T HAVE TO REPEAT ANYTHING IN
25 THE PRETRIAL BRIEFING, I ALREADY HAVE IT. IF YOU HAVE

1 SAID YOUR PIECE, FINE. I AM NOT GOING TO HOLD IT
2 AGAINST YOU. IF YOU SAID WHAT YOU ARE GOING TO SAY,
3 THAT'S WHAT I WILL GO ON. BUT I WILL SAY ONLY IF YOU
4 HAVE SOMETHING FURTHER TO ADD TO YOUR PRETRIAL BRIEFING,
5 IS EXPUNGEMENT OF PAST TEST RESULTS A LEGALLY
6 PERMISSIBLE FORM OF RELIEF IN THIS MATTER?

7 SO YOU WILL BOTH BRIEF THIS TO ME. I
8 WILL BE TOTALLY BLUNT HERE, THE INFORMATION THAT YOU
9 GAVE ME DID NOT ANSWER THE QUESTION. AND SO BE IT,
10 SOMETIMES COURTS GET ASKED TOUGH QUESTIONS, AND I WILL
11 CONTINUE TO DO MY OWN RESEARCH AS WELL. BUT IF YOU COME
12 UP WITH SOMETHING, PLEASE TELL ME IN THE MEANTIME. SO I
13 WILL WORK ON THAT.

14 THEN QUESTION SEVEN IS GOING TO BE,
15 AGAIN, ONLY IF YOU HAVE SOMETHING FURTHER TO ADD. IF
16 EXPUNGEMENT IS LEGALLY PERMISSIBLE, SHOULD EXPUNGEMENT
17 BE UNAVAILABLE TO DR. KITCHENS FOR ONE, EXAMS WHERE HE
18 DECLINED TO SEEK AN ACCOMMODATION; OR TWO, EXAMS WHERE
19 HE SOUGHT ACCOMMODATION, WAS DENIED BUT CHOSE TO TAKE
20 THE EXAM ANYWAY.

21 SO, AGAIN, I KNOW THIS WAS ADDRESSED
22 SOMEWHAT IN THE PRETRIAL BRIEFING, BUT I WANT TO GIVE
23 YOU BOTH A CHANCE TO ADD ANYTHING TO THAT ON THOSE
24 QUESTION, WHICH I THINK ARE IMPORTANT, IMPORTANT
25 QUESTIONS.

1 AND THEN QUESTION -- THAT'S GOING TO BE,
2 I THINK, WHERE THE QUESTIONS STOP. AND IT RAISES IN MY
3 MIND, THINKING ABOUT THIS, I THINK, WELL, IF DR.
4 KITCHENS IS RIGHT ON THE ADA QUESTIONS AND EXPUNGEMENT
5 IS LEGALLY AVAILABLE AND APPROPRIATE HERE, THERE IS --
6 IN MY MIND, THERE IS A FURTHER QUESTION OF WHETHER IS
7 THAT INJUNCTION ORDER APPROPRIATE UNDER GENERAL
8 INJUNCTION LAW, OKAY, BECAUSE I THINK THAT WOULD BE LIKE
9 A MANDATORY INJUNCTION THAT GENERALLY SPEAKING YOU HAVE
10 TO CONSIDER FACTORS LIKE THE PUBLIC INTEREST, OR YOU
11 HAVE TO WEIGH THE EQUITIES AND SO FORTH, THE THINGS YOU
12 NEED TO DO IN GIVING AN INJUNCTION.

13 I AM NOT GOING TO ASK FOR BRIEFING ON
14 THAT, OKAY. THE WAY I AM GOING TO DO IT IS IF WE GET
15 THROUGH THIS STAGE, LET'S SAY, AND SUPPOSE I FIND FOR
16 DR. KITCHENS ON THE ADA QUESTIONS, SUPPOSE I ORDER
17 ACCOMMODATIONS FOR A FUTURE TEST AND SUPPOSE I SAY, I
18 THINK EXPUNGEMENT COULD HAPPEN IN SOME FORM. I AM
19 ACTUALLY GOING TO ORDER FURTHER BRIEFING ON THE FINAL
20 QUESTION OF WHAT SHOULD THAT INJUNCTION LOOK LIKE, AND
21 IS IT APPROPRIATE UNDER INJUNCTION LAW.

22 AND I DON'T WANT TO INCLUDE THAT HERE FOR
23 TWO REASONS. ONE, IS IT WOULD BURN A LOT OF SPACE,
24 MAYBE, AND SWEEP IN A LOT OF QUESTIONS THAT I DON'T
25 THINK I WANT TO FOCUS ON RIGHT NOW; AND TWO IS, AS I

1 HAVE ALERTED YOU BOTH TO -- I REALLY -- I WOULD SAY
2 ALTHOUGH I HAVE NOT ANSWERED THE QUESTION IN MY MIND, I
3 AM PRETTY SKEPTICAL ABOUT EXPUNGEMENT. AND SO I DON'T
4 WANT TO WAIST YOUR TIME ON THE DETAILS OF HOW
5 EXPUNGEMENT WOULD WORK AND WEATHER AN INJUNCTION SHOULD
6 ISSUE UNTIL I AM SATISFIED THAT IT CAN AND SHOULD IN
7 THIS CASE BECAUSE -- ON THE FACTS OF THE CASE.

8 SO I AM GOING TO LEAVE THAT FOR THE
9 FUTURE. I AM GOING TO PUT THIS IN THE ORDER, I AM
10 TRYING TO PHRASE IT NOW, BUT I DON'T NEED TO YOU BRIEF
11 THAT TYPE OF THING.

12 OKAY. ALL RIGHT, QUESTIONS?

13 MS. MEW: I HAD JUST A COUPLE OF
14 MINISTERIAL ONES. FOR THE EXHIBIT LIST, I USUALLY JUST
15 DO MINE WHERE IT'S THE EXHIBIT NUMBER AND THE
16 DESCRIPTION THAT YOU REQUESTED. AND THEN, YOU KNOW,
17 OFFERED, ADMITTED, NOT ADMITTED AND THE DATE.

18 IS THAT SUFFICIENT INFORMATION?

19 THE COURT: SURE. YOU MAY WANT TO
20 INDICATE -- WHETHER IT'S A SEPARATE COLUMN OR IN THE
21 DESCRIPTION, YOU MAY WANT TO INCLUDE SOMETHING THAT IS
22 MORE DEFINITIVE THAN A VERBAL DESCRIPTION. MOST OF
23 THOSE DOCUMENTS HAD BATES NUMBERS OR DEPOSITION EXHIBIT
24 NUMBERS OR WHATEVER. IF YOU HAVE A NUMBER YOU CAN PUT
25 ON IT, THAT MY HELP.

1 MS. MEW: NO PROBLEM. YES, YOUR HONOR,
2 NO PROBLEM.

3 AND THEN AFTER THE P.I. HEARING, YOU
4 ORDERED US TO ORDER THE TRANSCRIPT AND THEN YOU
5 DISCUSSED THE PARTIES SPLITTING THE COST. WOULD THAT
6 ALSO BE THE CASE HERE?

7 THE COURT: DR. KITCHENS, WHAT DO YOU
8 THINK ABOUT THAT?

9 DR. KITCHENS: HOW MUCH IS THIS?

10 THE COURT: WELL, SO, I THINK IN ORDER TO
11 MINIMIZE THE COST, YOU ARE NOT GOING TO WANT TO RUSH IT.
12 SO I AM ACTUALLY NOT SURE WHAT THE COURT'S TIMELINES
13 ARE. I THINK I PUT THE SCHEDULE IN HERE TO WORK FOR A
14 NON RUSH TRANSCRIPT.

15 LYNN, DO YOU KNOW WHAT THE STANDARD
16 TIMELINE IS FOR A TRIAL TRANSCRIPT.

17 THE COURT REPORTER: THE MOST AMOUNT OF
18 DAYS IS 30 DAYS.

19 THE COURT: I WAS KIND OF THINKING 14.

20 SO THE ANSWER TO THE YOUR QUESTION, DR.
21 KITCHENS, YOU KNOW, THIS IS -- IT'S A HARD THING TO SAY,
22 AND I DO APPRECIATE THAT YOU ARE REPRESENTING YOURSELF,
23 AND I KNOW THERE IS A HARDSHIP FACTOR HERE, BUT IT WAS
24 ALSO -- THIS ENTIRE ENTERPRISES OF YOUR CHOOSING, AND I
25 THINK THERE IS A LIMIT -- AND I HAVE ASKED DEFENDANT TO

1 TAKE ON A LOT OF THE RESPONSIBILITIES IN THIS CASE FROM
2 TIME TO TIME, AND DO I THINK IT'S APPROPRIATE THAT YOU
3 SHARE HALF OF THE COST OF THE TRIAL TRANSCRIPT.

4 HOWEVER, WHEN YOU -- I THINK I AM GOING
5 TO LEAVE THE DATES ON THE ORDER AS IS ON THE THINKING OF
6 A 14-DAY TRANSCRIPT. IF WHEN YOU LOOK AT IT YOU DECIDE
7 -- BECAUSE THE TIME PRESSURE IS ALSO MORE ON YOUR SIDE,
8 DR. KITCHENS.

9 SO IF YOU LOOK AT IT AND SAY I WANT TO DO
10 THE 30-DAY TRANSCRIPT, IT'S A SIGNIFICANT SAVINGS FOR
11 YOU, IT'S WORTH IT TO YOU AND YOU NEED THESE DATES
12 ADJUSTED, YOU CAN COME BACK TO ME AND I CAN PUSH ALL OF
13 THE DATES BACK TO MAKE THAT WORK, OKAY.

14 DR. KITCHENS: YOUR HONOR, BECAUSE I
15 REALLY DON'T KNOW HOW THIS PART HERE WORKS NOW, WHERE I
16 HAD BEEN -- SO IT'S CLEAR THAT -- IS IT CLEAR THAT I
17 NEED TO WAIT TO TAKE THOSE EXAMS UNTIL AFTER ALL OF
18 THIS, SO I SHOULD BE THINKING LIKE AUGUST TO TAKE THE --
19 AFTER YOU HAVE ALREADY MADE YOUR RULING ON IT? BECAUSE
20 I AM TRYING TO FIGURE OUT HOW --

21 THE COURT: SO GOOD QUESTION. THIS
22 BRIEFING WILL BE FINISHED ON AUGUST 3RD. AND SOMETHING
23 OF THIS SIZE AND DIFFICULTY, I MEAN, EVEN IF WE HURRY
24 UP, IT'S SIX WEEKS, PROBABLY. I CANNOT MAKE ANY
25 PROMISES, BUT EVEN IF WE HURRY UP, IT'S SIX WEEKS, BUT

1 IT COULD EASILY BE LONGER THAN THAT SO YOU SHOULD NOT BE
2 PLANNING TO TAKE THAT EXAM ANY EARLIER THAN, YOU KNOW,
3 MID-FALL, I WOULD THINK.

4 DR. KITCHENS: OKAY, NO PROBLEM.

5 THE COURT: THAT'S JUST THE NATURE OF
6 FEDERAL LITIGATION.

7 DR. KITCHENS: YES, SIR. YES, JUDGE.

8 MS. MEW: ANOTHER MINISTERIAL QUESTION.
9 WE TALKED ABOUT THE EXHIBIT LIST. FOR THE ACTUAL
10 EXHIBITS, SO YOU WILL JUST NEED A COMPLETE SET, YOUR
11 HONOR, OF WHAT WAS ADMITTED, CORRECT, SO WE JUST NEED TO
12 PUT THAT TOGETHER. AND THEN DO YOU WANT THAT ON THE
13 DOCKET OR DO YOU JUST WANT THAT E-MAILED TO YOU.

14 THE COURT: ON THE DOCKET WOULD BE GOOD.
15 I THINK IT'S A HEALTHY THING TO FILE STUFF ON THE
16 DOCKET.

17 MS. MEW: I WILL FIGURE OUT SO THAT CLERK
18 -- I DO THINK THAT WITH DR. KITCHENS, WE SHOULD TAKE
19 AWAY -- THERE'S A FULL SET OF EXHIBITS OF NOT EVERYTHING
20 THAT WAS ADMITTED, SO TO JUST GET THAT OFF THE DOCKET.

21 THE COURT: SURE IF YOU WOULD LIKE THAT,
22 JUST LET ME KNOW.

23 MS. MEW: IS THAT SOMETHING THAT YOU
24 COULD DO WITHOUT US HAVING TO GO THROUGH -- IS THAT
25 SOMETHING THAT YOU COULD USE YOUR JUDGE MAGIC BEHIND THE

1 SCENES IF WE JUST TOLD WHAT YOU IT WAS.

2 THE COURT: YES, ABSOLUTELY, BUT I DON'T
3 WANT DO IT IN FORM OF NOTE TAKING BECAUSE OF THE CHANCE
4 THAT I CONVEY IT WRONG. SO IF YOU E-MAIL CHAMBERS WITH
5 WHAT YOU WOULD LIKE UP, WE CAN DO THAT.

6 MS. MEW: THANK YOU, YOUR HONOR.

7 THE COURT: YES. THAT WAY IT'S IN
8 WRITING, AND I AM NOT GOING TO MESS IT UP. OF IF I DO,
9 IF YOU SEND ME THE WRONG NUMBER, THEN THAT'S YOUR FAULT.

10 MS. MEW: I KNOW. I AM NOT GOING TO DO
11 IT TODAY, YOUR HONOR. I WILL DO IT AFTER A GOOD NIGHT'S
12 SLEEP.

13 WHAT DO YOU THINK, DR. KITCHENS?

14 DR. KITCHENS: I AGREE 110 PERCENT.

15 MS. MEW: OKAY.

16 DR. KITCHENS: I FEEL I HAVE LOST TEN
17 YEARS OFF MY LIFE IN THE PAST FOUR DAYS.

18 THE COURT: AFTER THE LAST TRIAL I HAD IN
19 PRIVATE PRACTICE BEFORE TAKING THIS JOB, I TOLD EVERYONE
20 ON THE TRIAL TEAM, I SAID, I DON'T KNOW HOW MANY TIMES I
21 CAN DO THIS. I THINK, I DON'T KNOW.

22 DR. KITCHENS: THIS IS NOT FOR ME.

23 THE COURT: I DON'T WANT TO BRAG, BUT
24 IT'S WAY EASIER TO BE HERE.

25 OKAY. ANY OTHER QUESTIONS FOR NOW?

1 MS. MEW: NOT FOR NOW. I AM SURE WE WILL
2 THINK OF SOME LATER, RIGHT, DR. KITCHENS? BUT THIS
3 SOUNDS LIKE A LOT TO WORK WITH RIGHT NOW.

4 DR. KITCHENS: WE WILL MANAGE.

5 THE COURT: LET ME SAY BEFORE WE SHUT
6 DOWN THAT THIS WAS -- I KNEW FROM THE PRELIMINARY
7 INJUNCTION HEARING, I KNEW THAT THIS TRIAL WAS GOING TO
8 BE POSSIBLE. GOING INTO THE P.I. HEARING, I DIDN'T KNOW
9 WHAT TO EXPECT BECAUSE I DON'T KNOW.

10 DR. KITCHENS, I WILL PROBABLY -- HONESTLY
11 I WILL PROBABLY GO THROUGH MY WHOLE CAREER AND NEVER SEE
12 A PRO SE LITIGANT WHOSE ACT IS AS TOGETHER AS YOURS.
13 IT'S PROBABLY NEVER GOING TO HAPPEN. SO BELIEVE ME,
14 IT'S NOT LIKE THIS AT ALL NORMALLY. VERY, VERY
15 DIFFERENT WHEN YOU ARE WORKING WITH A PRO SE LITIGANT.
16 ALTHOUGH THERE'S A COUPLE OF FREQUENT FLYERS IN THIS
17 COURTROOM. THERE ARE PRO SE LITIGANTS WHO ARE LAWYERS.
18 THAT'S PROBABLY ACTUALLY MAYBE THE WORST.

19 SO ANYWAY, SO AFTER THE P.I. HEARING, I
20 WAS REASSURED THE TRIAL WAS GOING TO WORK THIS WAY, AND
21 IT DID. SO IT'S A REAL CREDIT TO BOTH OF YOU, TO YOUR
22 PROFESSIONALISM AND THE ABILITY THAT YOU HAD TO WORK
23 TOGETHER, STAY ORGANIZED, STAY ON TRACK AND MAKE SURE
24 THAT ALL OF THE ISSUES GOT PRESENTED IN A REALLY FULL
25 AND FAIR WAY SO THAT YOU CAN GET THE DECISION THAT YOU

1 DESERVE FOR HAVING DONE ALL OF THAT HARD WORK, A
2 DECISION THAT IS BASED ON ALL OF THE INFORMATION THAT
3 OUGHT TO BE CONSIDERED. SO I THINK THAT'S GREAT. AND
4 YOU BOTH ARE TO BE COMMENDED FOR ALL OF THE HARD WORK
5 AND PROFESSIONALISM, SO THANK YOU.

6 DR. KITCHENS: THANK YOU, JUDGE.

7 MS. MEW: THANK YOU, YOUR HONOR.

8 THE COURT: ALL RIGHT. ANY FURTHER
9 BUSINESS?

10 DR. KITCHENS: NO.

11 MS. MEW: NO.

12 THE COURT: EVERYONE, WE WILL GO BACK TO
13 OUR CORNERS, WE WILL DO OUR THINGS, AND YOU SEE THIS
14 ORDER FROM US HOPEFULLY TODAY, OKAY?

15 DR. KITCHENS: THANK YOU, YOUR HONOR.

16 THANK YOU, MS. MEW.

17 MS. MEW: THANK YOU, DR. KITCHENS.

18 THE COURT: THANK YOU BOTH. BE WELL.

19 (COURT ADJOURNED.)

20 I CERTIFY THAT THE FOREGOING IS A CORRECT
21 TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
22 ABOVE-ENTITLED MATTER.

23 6-7-23

24 DATE

Lynn Gligor

OFFICIAL COURT REPORTER

25 LYNN GLIGOR, RMR

1 I N D E X

2 WITNESS DIRECT CROSS REDIRECT RECROSS

3 DR. TIMOTHY ALLEN

4 BY MS. MEW 4 -- -- --

5 BY DR. KITCHENS -- 45 -- --

6 DR. DANIEL JURICH

7 BY MS. MEW 80 -- 128, 133 --

8 BY DR. KITCHENS -- 110 -- 129, 134

9 EXHIBITS PAGE

10 D 57 7
 PJX 25 48
 11 PJX 49 65
 DJX 15 86
 12 DJX 16 87
 DJX 17 87
 13 DJX 18 88
 DJX 19 90
 14 DJX 20 90
 DJX 21 91
 15 DJX 22 91
 DJX 23 92

16

17

18

19

20

21

22

23

24

25

\$	117:21, 165:11	90:8, 90:19, 91:5,	318 ^[1] - 84:20	99:18, 104:8, 165:10
\$250 ^[1] - 138:10	15-MINUTE ^[1] - 84:15	91:16, 92:2, 92:7,	32 ^[1] - 108:11	70 ^[4] - 39:20, 127:2,
\$4,000 ^[1] - 139:6	15TH ^[3] - 149:19,	96:5, 96:15, 97:7,	320 ^[1] - 105:4	127:4, 127:22
'	150:4, 150:13	99:15, 99:22, 100:4,	35 ^[3] - 96:12, 96:14	700-13TH ^[1] - 2:3
'20 ^[1] - 90:7	16 ^[3] - 87:8, 88:9,	102:1, 104:5,	36 ^[2] - 96:12, 96:18	75 ^[1] - 67:4
'22 ^[1] - 76:4	165:12	104:11, 105:15,	3RD ^[4] - 150:3, 150:5,	76 ^[1] - 67:3
1	17 ^[3] - 88:9, 127:24,	106:17, 106:20,	150:16, 160:22	8
1 ^[47] - 15:22, 28:4,	165:12	107:5, 107:12,	4	8 ^[1] - 29:11
82:13, 82:14, 82:22,	17,500 ^[1] - 151:4	107:23, 108:10,	4 ^[2] - 1:12, 165:4	8,750 ^[1] - 151:7
84:6, 84:7, 84:13,	18 ^[6] - 1:8, 22:2, 22:8,	108:14, 108:20,	40 ^[14] - 56:20, 56:24,	80 ^[2] - 139:10, 165:7
85:25, 86:13, 86:16,	88:5, 88:10, 165:13	109:1, 128:10	57:25, 58:20, 59:5,	856)649-4774 ^[1] -
87:24, 90:8, 90:19,	19 ^[2] - 92:2, 165:13	2023 ^[13] - 1:8, 31:17,	84:8, 84:21, 84:22,	1:20
91:5, 96:6, 96:16,	19106 ^[2] - 1:9, 1:20	36:21, 36:25, 37:5,	95:20, 97:21, 98:2,	86 ^[1] - 165:11
96:22, 97:7, 99:15,	193 ^[1] - 125:18	38:2, 38:25, 39:1,	104:18, 139:19,	87 ^[2] - 165:12, 165:12
99:22, 100:4, 102:1,	1994 ^[1] - 5:1	40:2, 96:11, 99:18,	142:11	88 ^[1] - 165:13
102:22, 104:5,	1998 ^[1] - 5:2	104:8, 147:12	40475 ^[1] - 1:16	8:50 ^[2] - 3:7, 3:10
105:15, 107:24,	1999 ^[1] - 5:9	20TH ^[2] - 150:2,	41 ^[1] - 99:19	9
108:10, 109:1,	1:00 ^[2] - 79:19,	150:14	41840 ^[1] - 25:21	9 ^[9] - 3:7, 22:11,
111:25, 112:1,	102:24	21 ^[2] - 104:18, 165:14	42 ^[5] - 106:7, 106:22,	86:13, 86:17, 90:19,
112:4, 114:1, 114:3,	1ST ^[2] - 147:12, 148:7	21ST ^[1] - 104:17	107:4, 117:24, 118:2	99:15, 100:4, 102:1,
115:3, 115:4,	2	22 ^[5] - 20:25, 36:5,	43 ^[1] - 107:1	108:9
115:12, 116:12,	2 ^[24] - 1:15, 51:1,	36:11, 90:7, 165:15	45 ^[4] - 84:10, 84:14,	90 ^[7] - 95:21, 95:25,
116:16, 116:19,	83:1, 83:2, 83:6,	22-3301 ^[1] - 1:5	84:23, 165:5	96:3, 124:25, 125:1,
120:3, 128:19,	84:18, 84:19, 87:2,	220 ^[1] - 125:8	47 ^[4] - 104:9, 119:7,	165:13, 165:14
128:23, 128:25,	87:13, 91:16, 92:2,	222 ^[1] - 76:17	119:9, 119:10	90.9 ^[1] - 17:17
129:5, 130:1, 142:11	92:7, 106:8, 106:10,	22ND ^[2] - 32:20, 92:3	48 ^[2] - 104:14, 165:10	91 ^[2] - 165:14, 165:15
10 ^[5] - 3:7, 3:8, 27:13,	106:11, 106:12,	23 ^[3] - 31:17, 108:23,	49 ^[3] - 65:20, 104:24,	92 ^[1] - 165:15
38:2, 67:3	106:14, 106:17,	165:15	165:11	9:00 ^[1] - 3:8
100 ^[5] - 21:13, 21:17,	106:21, 107:5,	24-HOUR ^[1] - 86:5	5	9:20 ^[2] - 3:9, 3:10
22:15, 28:3, 44:25	107:12, 108:14,	25 ^[10] - 24:14, 30:23,	5 ^[8] - 22:12, 28:25,	A
10:20 ^[1] - 35:18	108:20, 112:1	48:25, 49:14, 90:8,	29:4, 36:21, 36:25,	A-L-L-E-N ^[1] - 4:18
11 ^[1] - 28:10	20 ^[8] - 12:16, 37:4,	96:5, 96:15, 107:23,	37:5, 56:3, 125:19	A-PRIME ^[1] - 70:8
110 ^[2] - 162:14, 165:8	56:20, 105:6, 109:5,	151:7, 165:10	50 ^[5] - 45:24, 67:3,	ABILITY ^[11] - 15:3,
110,000,000 ^[1] -	139:18, 143:2,	25TH ^[1] - 120:3	104:25, 108:17,	16:8, 18:8, 19:11,
65:13	165:14	26 ^[2] - 30:15, 38:25	151:4	25:4, 41:5, 65:5,
1164 ^[1] - 38:3	200 ^[2] - 105:3, 139:12	2609 ^[1] - 1:19	50/50 ^[1] - 3:17	65:9, 147:25,
120 ^[1] - 105:17	20005 ^[1] - 2:3	27 ^[1] - 27:5	500 ^[1] - 45:23	153:20, 163:22
128 ^[1] - 165:7	2002 ^[1] - 5:2	28 ^[6] - 87:2, 91:16,	51 ^[2] - 104:25, 105:1	ABLE ^[13] - 55:10,
129 ^[1] - 165:8	2003 ^[2] - 5:4, 5:21	106:20, 107:5,	57 ^[2] - 7:18, 165:10	59:4, 64:8, 85:3,
12:15 ^[3] - 79:18, 80:2,	2011 ^[1] - 76:7	107:12, 108:13	5TH ^[2] - 36:23, 37:3	105:3, 107:8, 111:8,
102:19	2013 ^[6] - 28:10,	280 ^[2] - 84:7, 139:10	6	117:20, 119:16,
130 ^[1] - 66:12	28:25, 29:4, 55:23,	91:5, 92:7, 99:22,	6 ^[1] - 38:25	124:15, 134:22,
133 ^[1] - 165:7	56:9, 73:17	104:5, 104:11,	60 ^[2] - 84:8, 95:20	139:2, 143:13
134 ^[1] - 165:8	2014 ^[3] - 8:3, 29:11,	105:15, 106:17,	600 ^[1] - 2:3	ABOUT ^[99] - 3:7,
136 ^[1] - 125:13	73:18	108:20, 109:1	601 ^[1] - 1:19	6:24, 7:1, 8:10, 9:3,
14 ^[4] - 117:24, 118:2,	2016 ^[1] - 30:1	29TH ^[2] - 92:4	61 ^[1] - 39:2	16:6, 18:10, 18:23,
128:10, 159:19	2017 ^[2] - 25:13, 30:15	3	625 ^[1] - 1:15	18:25, 19:3, 19:23,
14-DAY ^[1] - 160:6	2018 ^[4] - 24:14,	3 ^[3] - 83:7, 83:9,	65 ^[1] - 165:11	20:19, 21:6, 21:9,
14.2 ^[1] - 117:24	24:22, 26:22, 30:23	112:1	6TH ^[2] - 150:1,	21:16, 21:24, 22:5,
1442 ^[1] - 117:17	2020 ^[4] - 22:12, 27:5,	3/24/2023 ^[1] - 72:4	150:13	24:11, 25:1, 26:12,
15 ^[15] - 3:8, 9:24,	27:13, 56:3	30 ^[8] - 49:14, 56:17,	7	26:14, 29:5, 29:19,
30:1, 45:23, 58:5,	2021 ^[1] - 69:13	57:24, 58:19, 58:23,	7 ^[5] - 69:22, 96:11,	30:3, 30:8, 31:1,
58:22, 69:24, 84:10,	2022 ^[42] - 15:22,	97:21, 98:2, 159:18		31:23, 32:14, 32:18,
84:16, 84:24, 86:22,	16:19, 20:25, 22:1,	30-DAY ^[1] - 160:10		33:7, 33:24, 35:5,
111:7, 117:14,	22:3, 22:10, 27:22,	30-MINUTE ^[1] - 3:10		
	30:16, 36:5, 36:11,			
	37:4, 86:14, 86:17,			
	87:2, 87:13, 87:24,			

35:25, 38:12, 38:15,
39:5, 40:11, 42:24,
43:4, 44:11, 46:6,
53:10, 59:10, 62:13,
62:19, 66:20, 67:5,
68:25, 70:20, 70:21,
72:5, 72:8, 72:10,
74:25, 76:2, 77:16,
78:8, 81:7, 84:21,
85:3, 85:12, 86:6,
96:6, 96:15, 99:16,
104:6, 106:1,
106:10, 106:11,
110:22, 111:14,
116:6, 121:14,
121:23, 124:13,
124:25, 125:22,
136:21, 140:11,
142:16, 143:7,
143:20, 143:25,
146:1, 146:4,
146:10, 146:11,
147:4, 147:20,
149:23, 150:10,
150:19, 155:18,
157:3, 158:3, 159:8,
161:9
ABOVE [4] - 85:24,
104:19, 115:3,
164:22
ABOVE-ENTITLED [1]
- 164:22
ABSOLUTELY [5] -
7:24, 9:16, 18:6,
73:12, 162:2
ABSORBED [1] -
57:12
ABUOT [1] - 56:22
ABUSE [1] - 73:24
ACADEMIC [6] - 16:7,
16:13, 21:18, 41:6,
73:3, 73:7
ACADEMICALLY [1] -
34:3
ACCEPTED [1] -
10:21
ACCEPTING [1] -
38:14
ACCESS [6] - 28:3,
45:1, 64:7, 64:9,
64:12, 72:23
ACCOMMODATE [1] -
155:11
ACCOMMODATION
[17] - 10:9, 10:17,
19:25, 21:14, 21:17,
21:19, 22:16, 30:16,
78:23, 127:5, 127:8,
154:19, 154:25,
155:2, 156:18,
156:19
ACCOMMODATIONS
[12] - 9:20, 10:2,
10:3, 15:21, 15:24,
16:18, 27:22, 39:18,
43:8, 126:15,
131:23, 157:17
ACCOMPLISH [1] -
131:17
ACCORDING [4] -
56:5, 70:4, 73:2,
122:23
ACCORDINGLY [2] -
107:7, 155:12
ACCOUNT [1] - 60:9
ACCOUNTS [1] -
65:12
ACCURATE [1] -
124:4
ACHENBACH [7] -
66:15, 66:19, 67:13,
68:19, 68:20, 68:21,
68:23
ACKNOWLEDGE [1] -
68:8
ACKNOWLEDGED [1]
- 66:23
ACKNOWLEDGING
[1] - 26:3
ACQUIRED [1] - 37:24
ACRONYM [1] -
111:17
ACROSS [2] - 95:25,
96:2
ACT [2] - 12:6, 163:12
ACTING [1] - 56:19
ACTION [2] - 75:5,
84:1
ACTIVE [1] - 24:25
ACTIVITIES [3] -
40:22, 62:13, 153:21
ACTIVITY [2] - 27:24,
44:20
ACTUAL [11] - 16:3,
21:10, 26:19, 40:15,
62:15, 85:23,
124:17, 130:17,
138:13, 140:9, 161:9
ACTUALLY [18] -
25:12, 30:25, 31:3,
32:22, 36:7, 50:2,
57:18, 72:6, 74:4,
75:12, 118:24,
132:17, 135:3,
143:16, 149:8,
157:19, 159:12,
163:18
ADA [7] - 10:9, 10:15,
10:17, 155:9,
155:15, 157:4,
157:16
ADAPTIVE [1] - 11:4
ADD [10] - 65:17,
109:25, 110:1,
136:8, 136:10,
143:23, 155:23,
156:4, 156:15,
156:23
ADDED [1] - 5:15
ADDEND [3] - 37:14,
37:19, 37:20
ADDEDED [1] - 37:7
ADDENDUM [5] -
36:18, 36:21, 37:1,
37:4, 37:11
ADDERALL [28] -
24:4, 26:2, 26:15,
33:20, 38:18, 54:8,
56:12, 56:16, 57:14,
57:15, 57:24, 58:19,
59:13, 73:21, 73:24,
74:3, 74:6, 74:15,
74:16, 74:22, 75:5,
76:24, 77:5, 77:8,
77:11, 77:14, 77:23,
78:3
ADDING [1] - 132:18
ADDITION [1] - 126:13
ADDITIONAL [11] -
19:4, 28:6, 37:17,
37:23, 84:20, 126:2,
126:13, 131:1,
131:11, 151:22,
152:1
ADDRESS [8] - 56:2,
136:14, 136:20,
137:10, 141:23,
153:4, 153:6, 153:9
ADDRESSED [1] -
156:21
ADDRESSING [2] -
22:20, 48:5
ADDS [2] - 122:22,
131:13
ADEQUATELY [2] -
39:11, 71:3
ADHD [62] - 8:16,
8:17, 8:21, 9:2, 9:15,
10:6, 10:7, 17:17,
17:19, 22:19, 22:22,
24:6, 24:22, 24:23,
25:16, 25:21, 25:23,
26:4, 33:25, 34:1,
34:4, 34:12, 34:15,
38:17, 39:11, 41:11,
41:13, 44:12, 49:8,
49:12, 49:17, 49:22,
51:1, 51:10, 51:18,
52:16, 52:23, 53:13,
53:15, 54:16, 56:6,
56:9, 58:2, 58:21,
61:4, 61:12, 61:18,
69:17, 69:22, 69:25,
71:3, 73:13, 73:17,
74:3, 74:6, 74:15,
74:23, 76:24, 77:12,
140:22, 140:23,
141:1
ADJOURNED [1] -
164:19
ADJUSTED [1] -
160:12
ADJUSTING [1] -
127:8
ADMINISTER [3] -
50:7, 50:18, 50:19
ADMINISTERED [5] -
50:21, 50:24, 94:22,
95:1, 120:24
ADMINISTRATION [8]
- 81:18, 85:14,
94:25, 96:6, 96:22,
109:4, 114:3, 127:7
ADMIT [11] - 7:15,
48:24, 86:18, 87:4,
87:15, 88:1, 90:10,
90:21, 91:7, 91:18,
92:9
ADMITTED [31] - 7:17,
7:18, 48:25, 65:19,
65:20, 85:2, 85:5,
86:21, 86:22, 87:7,
87:8, 87:18, 87:19,
88:4, 88:5, 90:13,
90:14, 90:24, 90:25,
91:10, 91:11, 91:21,
91:22, 92:12, 92:13,
147:6, 147:21,
158:17, 161:11,
161:20
ADOPT [2] - 151:10,
151:16
ADOPTED [1] - 13:10
ADRENALIN [1] -
140:18
ADULTS [3] - 57:19,
65:10, 77:18
ADVANTAGE [3] -
131:12, 135:5, 135:8
ADVANTAGED [1] -
133:22
ADVERSE [1] - 77:23
AFFECT [5] - 18:15,
29:22, 30:9, 57:12,
77:23
AFFECTS [1] - 130:16
AFFIRMATIVE [5] -
16:24, 28:17, 35:22,
93:9, 103:5
AFRICAN [2] - 51:25,
63:10
AFTER [19] - 31:17,
37:12, 82:16, 82:17,
82:21, 82:23, 83:3,
86:10, 105:4, 129:8,
134:11, 138:15,
151:1, 159:3,
160:17, 160:19,
162:11, 162:18,
163:19
AFTERNOON [1] -
110:13
AGAIN [50] - 13:17,
13:23, 14:7, 14:16,
17:1, 17:3, 17:13,
20:5, 20:22, 21:25,
23:12, 24:10, 24:24,
25:10, 25:20, 30:9,
31:7, 31:10, 32:10,
33:16, 35:6, 41:2,
41:11, 41:16, 48:12,
50:18, 67:18, 68:9,
74:24, 92:5, 94:16,
96:5, 99:16, 99:21,
99:23, 104:9,
106:16, 106:21,
107:3, 122:16,
124:9, 127:23,
133:14, 136:16,
136:20, 142:20,
142:22, 148:7,
156:15, 156:21
AGAINST [3] - 141:8,
141:10, 156:2
AGENCIES [1] - 9:23
AGENCY [1] - 5:23
AGO [1] - 22:8
AGREE [11] - 49:3,
57:23, 58:18, 61:2,
61:10, 71:15, 89:15,
119:15, 147:5,
147:23, 162:14
AGREED [1] - 147:9
AGREEMENT [1] -
90:6
AHEAD [10] - 48:10,
110:9, 113:3, 113:6,
114:15, 114:16,
116:21, 123:8,
137:7, 152:4
AIDED [1] - 1:22
ALERT [3] - 13:13,
14:1, 14:3
ALERTED [1] - 158:1
ALERTS [1] - 14:5
ALIGNING [1] - 83:18
ALL [112] - 3:10, 3:22,
4:2, 7:1, 8:6, 8:7,
11:3, 12:12, 13:2,
13:10, 16:1, 19:6,

20:9, 20:13, 20:23,
21:1, 22:7, 24:1,
27:20, 30:20, 34:2,
34:7, 35:15, 35:18,
40:25, 41:1, 42:20,
44:15, 45:5, 45:8,
45:16, 47:3, 50:1,
52:7, 53:6, 57:13,
57:16, 57:21, 58:16,
68:10, 68:11, 68:19,
78:13, 79:14, 80:5,
84:2, 84:4, 85:2,
89:7, 90:1, 90:5,
96:2, 96:19, 102:16,
102:22, 102:25,
103:2, 104:17,
106:13, 108:8,
108:15, 108:21,
109:2, 109:9,
109:12, 110:6,
112:22, 116:22,
117:4, 117:7, 118:5,
118:7, 119:16,
121:7, 127:21,
129:16, 129:21,
132:23, 133:7,
135:19, 136:1,
137:3, 138:7, 140:6,
141:3, 141:12,
141:23, 142:10,
142:11, 142:23,
143:2, 143:11,
144:9, 144:17,
146:4, 146:19,
148:1, 148:22,
149:22, 150:9,
151:22, 154:2,
158:12, 160:12,
160:17, 163:14,
163:24, 164:1,
164:2, 164:4, 164:8
ALLEN [43] - 4:6, 4:7,
4:12, 4:13, 4:17,
4:21, 7:12, 7:22,
10:6, 10:23, 15:20,
35:12, 36:5, 39:4,
45:11, 45:17, 46:15,
47:9, 48:13, 48:20,
49:3, 52:9, 56:14,
61:4, 62:17, 63:1,
63:11, 65:15, 66:1,
70:13, 71:19, 72:15,
75:23, 76:22, 77:15,
77:22, 78:9, 78:22,
79:11, 110:13,
110:16, 111:13,
165:3
ALLEN'S [1] - 62:10
ALLEVIATE [1] - 12:9
ALLOTED [13] -
84:15, 86:1, 86:2,
93:24, 94:2, 94:4,
94:13, 117:19,
117:23, 124:24,
125:23, 130:17
ALLOW [2] - 136:11,
136:24
ALLOWED [3] - 58:1,
93:25, 134:19
ALLOWING [1] -
126:21
ALLOWS [2] - 127:6,
127:10
ALMOST [10] - 8:20,
8:22, 9:9, 13:10,
17:23, 21:21, 22:2,
46:12, 59:15, 69:22
ALONE [1] - 21:17
ALONG [5] - 5:12,
84:24, 124:17,
132:12, 138:14
ALREADY [10] -
19:20, 39:7, 78:21,
83:17, 85:4, 146:25,
148:3, 155:25,
160:19
ALSO [53] - 5:9, 6:3,
6:13, 6:20, 6:25,
8:15, 9:13, 9:19,
11:11, 19:25, 25:9,
32:8, 41:10, 44:12,
47:21, 55:2, 57:12,
59:1, 70:4, 73:20,
75:1, 75:2, 75:13,
83:20, 83:23, 84:9,
85:24, 97:24, 98:2,
98:11, 105:25,
112:15, 120:19,
121:1, 124:5,
124:17, 132:4,
134:1, 139:3,
139:13, 139:24,
140:1, 142:7,
143:12, 143:13,
146:22, 149:20,
151:14, 152:23,
154:8, 159:6,
159:24, 160:7
ALTER [7] - 126:3,
126:5, 126:16,
126:24, 127:4,
127:13, 127:17
ALTERATION [1] -
37:8
ALTERATIONS [1] -
22:7
ALTERS [1] - 127:16
ALTHOUGH [3] -
151:23, 158:2,
163:16
ALWAYS [6] - 6:23,
9:9, 42:1, 44:15,
111:17, 144:4
AM [113] - 5:8, 5:13,
5:19, 7:2, 7:3, 8:18,
9:8, 9:16, 16:1, 16:2,
16:3, 16:5, 16:12,
16:16, 17:24, 20:15,
22:3, 24:12, 33:11,
37:16, 40:24, 41:25,
44:14, 44:15, 45:7,
45:12, 45:13, 46:12,
47:11, 47:15, 48:4,
48:23, 49:11, 50:7,
51:2, 51:17, 52:6,
54:1, 54:3, 54:5,
56:17, 56:21, 59:12,
66:14, 68:18, 72:10,
75:23, 75:25, 78:24,
81:2, 82:4, 86:12,
89:22, 103:9,
103:11, 106:18,
107:6, 109:11,
110:14, 111:13,
111:22, 112:6,
112:24, 113:11,
116:3, 121:13,
123:4, 126:6, 126:7,
126:17, 128:10,
130:8, 130:21,
131:1, 131:4,
131:24, 135:7,
138:2, 140:3, 142:3,
142:6, 144:23,
145:25, 149:6,
149:8, 149:10,
149:12, 150:6,
152:5, 152:9,
152:10, 152:11,
152:25, 153:1,
153:13, 153:16,
154:21, 155:15,
156:1, 157:13,
157:14, 157:18,
158:3, 158:6, 158:8,
158:9, 159:12,
160:4, 160:20,
162:8, 162:10, 163:1
AMENABLE [1] - 15:5
AMERICAN [5] - 5:13,
51:25, 63:10, 111:5,
111:6
AMERICAN-BASED
[1] - 111:6
AMONG [2] - 142:2,
147:23
AMOUNT [19] - 21:4,
56:25, 58:19, 68:7,
95:9, 95:21, 97:14,
97:22, 98:10,
100:16, 101:21,
107:20, 117:13,
121:2, 131:9, 132:4,
141:24, 149:19,
159:17
AMPHETAMINE [2] -
24:3, 24:5
AN [96] - 3:14, 9:20,
10:6, 10:15, 11:4,
12:17, 13:18, 14:23,
18:5, 20:3, 21:19,
22:12, 23:4, 24:25,
31:12, 32:1, 34:11,
36:14, 36:17, 36:18,
37:4, 37:8, 37:11,
40:14, 41:5, 41:21,
44:12, 49:22, 49:23,
55:17, 58:25, 59:1,
61:2, 61:24, 64:9,
68:7, 69:12, 69:25,
72:2, 72:8, 72:23,
73:8, 81:18, 84:8,
84:11, 84:19, 84:22,
85:12, 88:11, 89:1,
92:18, 93:16, 93:20,
93:25, 94:6, 95:16,
95:18, 95:19, 95:25,
96:3, 109:23, 111:4,
111:9, 112:7,
116:11, 117:5,
122:14, 122:16,
128:18, 129:2,
129:24, 130:16,
130:22, 131:12,
132:12, 132:15,
132:20, 133:19,
135:1, 135:11,
138:1, 138:23,
139:7, 139:11,
139:16, 140:3,
146:5, 147:15,
148:12, 154:5,
155:10, 155:16,
156:18, 157:12,
158:5
ANA [1] - 65:13
ANALOGOUS [1] -
50:8
ANALYSIS [3] - 67:2,
69:20, 154:2
ANCESTORS [1] -
11:7
AND [703] - 3:16, 3:18,
3:19, 4:3, 4:16, 5:3,
5:10, 5:13, 5:14,
5:15, 5:22, 5:24, 6:1,
6:3, 6:9, 6:16, 6:18,
6:23, 7:5, 7:8, 7:12,
8:2, 8:5, 8:6, 8:11,
8:12, 8:16, 8:23, 9:3,
9:11, 9:13, 9:14,
9:18, 10:1, 10:6,
10:7, 10:9, 10:16,
11:13, 11:17, 11:18,
11:19, 11:22, 12:5,
12:6, 12:7, 12:10,
12:13, 12:20, 12:21,
13:1, 13:8, 13:9,
13:12, 13:16, 13:22,
13:24, 14:2, 14:5,
14:11, 14:14, 14:16,
15:1, 15:7, 15:17,
16:9, 16:19, 17:1,
17:3, 17:9, 17:11,
18:7, 18:13, 18:18,
18:25, 19:3, 19:5,
19:9, 19:13, 19:23,
20:4, 20:8, 20:13,
20:17, 20:22, 21:9,
21:10, 21:11, 21:21,
21:22, 22:6, 22:7,
22:18, 22:21, 23:8,
23:13, 23:14, 23:18,
23:24, 24:6, 24:7,
24:8, 24:12, 24:15,
24:16, 25:3, 25:4,
25:5, 25:6, 25:8,
25:11, 25:22, 26:3,
26:8, 26:9, 26:10,
26:22, 27:5, 27:11,
27:12, 28:7, 28:12,
29:8, 29:13, 29:17,
29:22, 30:7, 30:9,
30:11, 30:22, 31:7,
31:11, 31:15, 31:25,
32:3, 32:5, 32:7,
32:21, 33:5, 33:13,
33:18, 34:3, 34:6,
34:8, 34:12, 34:22,
35:7, 35:9, 35:10,
35:17, 36:1, 36:7,
36:12, 36:14, 36:16,
36:18, 37:4, 37:13,
37:17, 38:1, 38:3,
38:9, 38:14, 38:17,
38:18, 39:1, 39:10,
39:20, 40:4, 40:8,
40:22, 40:25, 41:12,
41:24, 42:11, 42:20,
42:24, 43:1, 43:10,
43:11, 43:17, 44:7,
44:10, 44:16, 44:24,
45:24, 46:3, 46:5,
46:19, 46:25, 47:1,
48:3, 48:9, 48:20,
49:4, 49:15, 49:24,
50:5, 50:9, 50:12,
50:19, 50:21, 50:25,
51:4, 51:12, 51:14,
51:20, 51:23, 52:4,
52:7, 52:16, 52:18,
53:6, 54:5, 54:8,

54:10, 54:11, 54:12,
54:15, 54:18, 54:23,
55:7, 55:15, 55:16,
55:19, 55:22, 55:24,
56:8, 56:14, 56:24,
59:10, 59:16, 59:18,
60:12, 60:24, 61:16,
61:25, 62:4, 62:7,
62:9, 62:12, 62:14,
62:18, 62:19, 62:23,
63:1, 63:10, 63:15,
63:17, 63:25, 64:1,
64:5, 64:10, 64:13,
64:15, 64:17, 64:20,
64:24, 65:1, 65:2,
65:3, 65:9, 65:10,
65:24, 65:25, 66:9,
66:12, 66:18, 66:21,
66:24, 66:25, 67:3,
67:4, 67:8, 67:9,
68:1, 68:4, 68:8,
68:9, 68:11, 68:13,
69:6, 69:14, 69:17,
69:18, 69:19, 69:23,
70:4, 70:9, 70:16,
70:20, 70:24, 71:19,
71:22, 71:23, 72:7,
72:11, 73:2, 73:13,
73:17, 73:20, 73:23,
73:24, 74:3, 74:9,
74:10, 74:11, 74:17,
74:19, 74:21, 75:1,
75:4, 75:5, 75:12,
75:19, 76:5, 76:8,
76:11, 76:18, 76:20,
77:14, 77:22, 78:7,
79:25, 80:1, 80:19,
81:8, 81:12, 81:17,
81:18, 81:22, 81:23,
82:2, 82:5, 82:20,
82:25, 83:7, 83:11,
83:18, 83:20, 83:23,
84:9, 84:10, 84:15,
84:23, 85:2, 85:3,
85:15, 85:21, 85:23,
86:2, 86:3, 86:6,
86:25, 87:4, 88:10,
88:14, 88:16, 88:20,
89:3, 89:5, 89:11,
90:6, 90:17, 91:25,
92:16, 92:17, 92:21,
93:3, 93:17, 93:20,
94:2, 94:7, 94:10,
94:11, 94:23, 95:2,
95:3, 95:6, 95:8,
95:11, 95:13, 95:15,
95:20, 95:22, 96:4,
96:5, 96:11, 96:12,
96:17, 96:22, 97:11,
97:13, 97:16, 97:19,
97:23, 98:1, 98:6,

98:10, 98:11, 98:19,
98:23, 99:2, 99:4,
99:8, 99:13, 99:15,
99:21, 99:24, 100:6,
100:13, 100:17,
100:25, 101:14,
101:17, 101:22,
102:4, 102:10,
102:12, 102:21,
103:6, 103:19,
104:5, 104:11,
104:13, 104:17,
104:24, 104:25,
105:1, 105:21,
106:13, 106:23,
107:5, 107:6, 107:8,
107:13, 107:17,
107:18, 108:3,
108:25, 109:13,
109:23, 109:24,
110:3, 110:19,
110:24, 111:3,
113:17, 113:19,
113:20, 114:7,
114:25, 115:16,
115:21, 116:20,
116:23, 117:8,
117:12, 117:14,
117:22, 117:24,
118:2, 118:5, 118:6,
118:15, 118:21,
118:24, 118:25,
119:3, 119:4, 119:7,
119:12, 119:19,
119:23, 119:25,
120:2, 120:5,
120:11, 120:20,
121:6, 122:6, 122:7,
122:15, 122:18,
123:1, 123:19,
124:1, 124:4, 124:6,
124:16, 124:19,
124:24, 125:9,
125:22, 125:23,
127:3, 127:6,
127:12, 128:10,
128:11, 128:20,
128:24, 129:8,
130:8, 130:9, 131:8,
131:12, 131:13,
131:14, 131:24,
132:3, 132:4,
132:13, 132:15,
132:19, 132:20,
133:14, 134:1,
134:17, 134:20,
134:21, 134:22,
135:2, 135:11,
135:12, 135:23,
136:14, 136:15,
136:17, 136:22,

136:24, 137:10,
138:2, 138:4,
138:11, 138:13,
138:17, 138:20,
139:4, 139:12,
139:14, 139:21,
139:24, 139:25,
140:1, 140:4, 140:5,
140:6, 140:15,
140:16, 140:18,
140:20, 140:22,
140:24, 140:25,
141:1, 141:2, 141:5,
141:17, 141:25,
142:1, 142:2, 142:4,
142:10, 142:12,
142:13, 142:14,
142:24, 143:2,
143:4, 143:11,
143:12, 143:17,
143:25, 144:1,
144:11, 144:13,
145:6, 145:18,
145:19, 145:23,
146:4, 146:5,
146:10, 146:12,
146:16, 146:19,
146:20, 146:22,
147:5, 147:8,
147:14, 147:15,
147:19, 148:1,
148:4, 148:5, 148:6,
148:19, 148:23,
148:24, 149:17,
149:18, 149:19,
149:20, 149:21,
149:22, 149:25,
150:2, 150:13,
150:15, 150:20,
151:1, 151:6, 151:8,
151:13, 151:14,
151:18, 151:19,
151:21, 152:14,
152:16, 152:18,
152:23, 153:4,
153:11, 153:16,
154:6, 154:7, 154:8,
155:4, 155:8,
155:20, 155:21,
155:22, 156:9,
156:10, 157:1,
157:2, 157:4, 157:5,
157:11, 157:15,
157:17, 157:20,
157:22, 157:24,
157:25, 158:3,
158:5, 158:6,
158:15, 158:16,
158:17, 159:3,
159:4, 159:22,
159:23, 159:24,

159:25, 160:2,
160:9, 160:11,
160:12, 160:22,
160:23, 161:12,
162:8, 163:11,
163:20, 163:22,
163:23, 163:25,
164:3, 164:5, 164:13
AND/OR ^[1] - 66:22
ANHEDONIA ^[1] -
40:21
ANOTHER ^[10] -
17:18, 50:6, 88:20,
102:18, 104:7,
124:6, 124:15,
144:1, 147:16, 161:8
ANSWER ^[47] - 13:15,
53:20, 73:10, 77:2,
102:12, 104:20,
105:20, 105:22,
109:23, 110:5,
119:16, 119:20,
120:8, 120:17,
121:10, 121:15,
122:11, 122:25,
123:6, 124:6, 124:7,
124:11, 124:15,
125:6, 131:5, 132:3,
132:13, 135:2,
135:15, 136:18,
138:19, 138:23,
138:24, 139:2,
140:15, 141:9,
142:25, 143:1,
143:6, 143:18,
144:8, 154:13,
154:18, 154:20,
154:24, 156:9,
159:20
ANSWERED ^[4] -
82:11, 132:7,
142:13, 158:2
ANSWERING ^[5] -
66:20, 96:21, 116:3,
131:17, 143:21
ANSWERS ^[14] -
89:18, 105:4, 105:6,
105:17, 129:8,
132:3, 132:4, 132:5,
139:3, 141:7,
141:17, 142:21,
155:5, 155:7
ANTICIPATED ^[1] -
62:16
ANTIDEPRESSANTS
^[2] - 13:1, 23:21
ANXIETY ^[102] - 7:23,
8:8, 8:11, 8:19, 8:23,
9:1, 9:14, 10:6, 10:7,
10:24, 10:25, 11:2,

11:9, 11:10, 11:11,
11:21, 11:25, 12:10,
13:1, 13:3, 13:21,
14:9, 14:15, 14:21,
15:10, 15:16, 17:2,
17:6, 17:9, 17:11,
17:14, 18:15, 18:23,
18:24, 18:25, 19:3,
19:5, 19:7, 19:15,
20:1, 20:4, 20:5,
20:7, 20:9, 21:3,
21:9, 22:4, 22:9,
23:5, 23:6, 23:12,
25:9, 26:6, 28:8,
28:20, 29:1, 29:6,
29:17, 29:19, 30:3,
30:8, 30:10, 30:12,
30:19, 30:21, 31:1,
31:6, 31:10, 31:25,
32:2, 32:5, 33:1,
33:9, 33:14, 33:17,
38:7, 38:17, 39:6,
39:23, 39:24, 40:6,
40:12, 40:18, 40:25,
41:13, 41:17, 44:12,
62:2, 62:11, 62:12,
62:14, 62:20, 62:22,
63:8, 63:18, 64:18,
65:6, 65:8, 65:12,
141:1
ANXIETY-TYPE ^[1] -
11:25
ANXIOUS ^[3] - 11:5,
32:5, 35:7
ANY ^[58] - 3:23, 5:11,
21:17, 22:18, 25:10,
26:12, 26:24, 27:24,
31:5, 32:17, 39:23,
40:15, 41:4, 41:21,
44:20, 45:3, 63:9,
67:9, 69:9, 70:1,
78:25, 82:17, 84:12,
84:15, 86:6, 99:2,
105:22, 107:14,
107:25, 109:7,
121:10, 121:14,
126:20, 129:4,
129:14, 130:23,
133:1, 135:14,
137:4, 137:9, 139:2,
141:6, 144:20,
145:13, 147:6,
147:9, 147:20,
148:4, 148:9,
151:24, 154:25,
155:10, 160:24,
161:2, 162:25, 164:8
ANYONE ^[3] - 42:17,
129:2, 150:10
ANYTHING ^[28] - 21:9,

21:16, 24:11, 26:25,
28:19, 28:24, 29:1,
29:5, 29:18, 29:19,
30:3, 30:8, 30:11,
30:18, 32:14, 79:6,
106:1, 133:4, 136:3,
136:8, 136:11,
136:16, 143:23,
145:3, 151:23,
155:24, 156:23
ANYTIME [1] - 130:20
ANYWAY [5] - 5:6,
126:25, 146:7,
156:20, 163:19
APOLOGIES [1] -
106:19
APOLOGIZE [3] -
106:23, 112:16,
126:17
APPALACHIA [1] -
51:13
APPEAR [3] - 97:14,
100:4, 100:9
APPEARANCES [2] -
1:13, 2:1
APPEARS [1] - 98:12
APPETITE [1] - 77:17
APPLICANT [1] - 18:9
APPLICANT'S [1] -
111:9
APPLICANTS [1] -
27:19
APPLICATION [2] -
51:17, 81:16
APPLICATIONS [1] -
20:11
APPLIES [1] - 17:5
APPLYING [2] - 47:19,
111:9
APPRECIATE [4] -
112:10, 137:2,
143:21, 159:22
APPREHENSIVE [1] -
62:12
APPROACH [1] -
96:24
APPROPRIATE [9] -
29:22, 30:9, 109:23,
127:5, 147:9, 157:5,
157:7, 157:21, 160:2
APPROXIMATELY [5]
- 82:6, 84:20, 84:22,
105:3, 105:17
APRIL [1] - 20:25
ARE [229] - 3:6, 5:7,
5:18, 6:22, 7:4, 7:5,
7:22, 8:9, 8:10, 8:12,
8:15, 8:25, 9:9, 9:13,
9:19, 10:11, 11:17,
12:6, 12:8, 12:15,
12:17, 15:14, 15:25,
16:6, 16:14, 17:6,
17:7, 17:22, 18:13,
18:14, 18:17, 18:23,
18:24, 19:8, 19:25,
20:1, 20:10, 24:6,
25:11, 26:18, 27:4,
28:8, 30:25, 33:17,
33:19, 34:2, 34:24,
35:20, 37:21, 38:18,
38:22, 39:11, 40:24,
41:2, 41:3, 41:15,
41:21, 42:6, 42:8,
42:10, 42:16, 42:24,
42:25, 43:1, 44:16,
45:6, 45:11, 45:13,
46:22, 47:4, 47:9,
49:15, 50:1, 50:15,
51:12, 51:23, 52:6,
53:22, 53:23, 54:9,
55:3, 55:8, 56:24,
57:8, 57:12, 57:13,
57:20, 57:21, 59:22,
59:25, 61:16, 61:18,
63:1, 63:11, 64:8,
64:11, 65:11, 66:14,
66:20, 66:22, 67:2,
67:4, 68:6, 68:11,
68:23, 70:5, 70:21,
71:3, 72:6, 72:16,
72:24, 72:25, 74:18,
75:1, 75:13, 75:23,
77:3, 77:14, 78:22,
79:4, 80:6, 81:24,
82:2, 82:6, 83:5,
83:24, 84:2, 85:23,
88:8, 88:10, 88:16,
92:17, 94:14, 95:1,
95:16, 95:20, 96:15,
103:3, 103:8,
103:25, 106:10,
106:11, 107:5,
109:21, 109:22,
110:6, 110:13,
110:16, 110:24,
111:8, 111:12,
111:16, 112:12,
114:10, 115:2,
115:3, 116:14,
118:8, 120:17,
120:24, 121:5,
121:6, 121:7,
121:19, 122:1,
122:4, 122:15,
123:11, 123:19,
124:9, 129:8,
130:19, 133:20,
133:21, 133:22,
135:4, 135:11,
135:12, 137:15,
138:6, 138:8,
138:12, 138:22,
139:11, 139:25,
140:6, 140:8,
140:11, 140:13,
141:4, 143:14,
143:19, 144:8,
145:13, 146:13,
146:21, 146:22,
147:5, 147:9,
148:19, 148:25,
149:4, 150:9,
150:18, 150:19,
150:21, 150:22,
150:23, 150:24,
153:16, 153:21,
154:9, 155:8, 155:9,
155:17, 156:2,
156:24, 159:11,
159:13, 159:22,
163:15, 163:17,
164:4
AREA [4] - 35:24,
113:22, 114:20,
115:1
AREAS [5] - 20:9,
20:13, 20:23, 51:24,
62:24
AREN'T [1] - 67:18
ARGUE [2] - 146:17
ARGUMENT [3] -
146:15, 151:2, 152:1
ARGUMENTS [3] -
153:5, 154:7, 154:9
AROUND [7] - 9:14,
10:7, 23:14, 96:3,
97:9, 98:2, 110:20
ARRANGE [2] - 147:1,
149:1
ARTICLE [1] - 69:12
AS [132] - 3:25, 6:7,
7:23, 8:7, 8:25, 9:5,
9:20, 10:6, 10:8,
10:15, 10:17, 10:18,
11:11, 13:11, 14:3,
14:20, 15:2, 15:6,
15:18, 15:23, 18:5,
19:20, 21:13, 22:4,
22:15, 22:22, 23:19,
23:20, 25:22, 26:9,
27:25, 28:7, 32:3,
34:1, 34:6, 34:10,
35:7, 37:8, 37:12,
39:18, 41:18, 44:13,
46:11, 49:4, 55:7,
56:17, 57:5, 60:17,
66:5, 66:19, 68:6,
72:9, 74:13, 76:2,
76:16, 76:21, 77:18,
77:25, 78:1, 82:1,
82:2, 82:5, 82:8,
88:11, 89:23, 94:10,
95:19, 96:24, 97:17,
98:3, 98:17, 99:14,
99:16, 101:24,
102:14, 104:4,
104:19, 107:16,
109:18, 109:25,
112:22, 115:15,
116:14, 116:16,
116:18, 125:24,
127:11, 128:19,
129:2, 133:13,
133:24, 136:9,
138:6, 140:7,
140:23, 142:24,
143:1, 143:12,
148:6, 148:9,
148:13, 148:24,
150:8, 150:10,
151:11, 151:20,
153:22, 154:15,
154:16, 154:17,
154:22, 154:23,
156:11, 157:25,
160:5, 163:12
ASIAN [1] - 63:9
ASK [24] - 19:23,
33:20, 41:20, 45:17,
47:21, 48:12, 57:23,
61:10, 72:18, 79:7,
82:11, 89:14, 89:18,
96:6, 99:15, 102:13,
104:6, 110:3, 126:2,
133:1, 141:13,
150:10, 150:17,
157:13
ASKED [9] - 78:21,
79:8, 109:21, 110:6,
132:11, 134:11,
137:11, 156:10,
159:25
ASKING [6] - 72:10,
78:20, 114:11,
126:18, 136:19,
140:11
ASKS [1] - 13:12
ASSESS [3] - 31:14,
81:20, 113:25
ASSESSED [1] - 83:5
ASSESSMENT [13] -
25:8, 31:8, 31:9,
41:21, 46:12, 66:4,
81:23, 111:19,
112:4, 114:2,
127:10, 127:18,
133:19
ASSESSMENTS [5] -
5:25, 6:15, 6:16, 7:8,
66:7
ASSOCIATE [2] -
81:2, 82:1
ASSOCIATED [4] -
65:1, 65:8, 73:13,
83:21
ASSUMING [2] -
33:11, 79:20
AT [128] - 3:7, 3:8, 3:9,
5:2, 5:3, 5:20, 6:10,
7:2, 7:3, 7:7, 9:23,
11:3, 12:5, 16:20,
17:16, 18:1, 18:19,
19:24, 24:1, 24:14,
25:1, 25:7, 25:11,
25:13, 27:15, 28:6,
28:7, 31:19, 33:4,
33:8, 34:17, 35:13,
35:18, 36:4, 37:22,
38:12, 38:23, 39:13,
42:9, 44:7, 44:17,
45:16, 47:16, 48:17,
55:4, 56:18, 59:15,
59:23, 64:25, 65:16,
65:24, 69:12, 69:13,
75:20, 76:24, 78:7,
81:7, 82:6, 85:10,
88:14, 89:18, 90:5,
92:21, 94:5, 94:6,
94:17, 96:22, 96:25,
97:2, 97:5, 97:13,
97:15, 98:1, 98:2,
98:13, 99:18, 99:24,
100:3, 100:6,
100:12, 100:17,
101:2, 101:20,
102:4, 102:19,
102:21, 102:23,
104:16, 105:1,
105:14, 105:25,
106:1, 106:6, 106:8,
106:21, 107:6,
108:1, 108:2, 108:5,
108:7, 108:11,
108:18, 119:19,
121:7, 128:11,
131:17, 131:20,
135:12, 138:2,
139:12, 140:8,
140:9, 142:2, 143:4,
144:13, 147:14,
147:19, 148:12,
149:5, 149:12,
151:4, 153:5, 154:2,
160:6, 160:9, 163:14
ATTACH [1] - 15:15
ATTEMPT [4] - 83:18,
83:22, 106:8, 129:11
ATTEMPTS [3] -
83:15, 84:2, 84:4
ATTENTION [8] -
17:22, 25:22, 49:24,

69:7, 69:13, 74:9,
143:3, 147:22
AUGUST [6] - 28:25,
150:3, 150:5,
150:16, 160:18,
160:22
AUTHENTICATED [1]
- 48:20
AVAILABLE [14] -
5:17, 12:12, 17:25,
19:11, 70:10, 72:25,
75:6, 94:5, 108:2,
108:9, 108:16,
108:22, 109:3, 157:5
AVERAGE [10] - 67:3,
69:23, 95:17, 95:21,
95:25, 96:3, 124:19,
124:23, 124:24
AWARE [7] - 70:5,
109:21, 112:12,
130:19, 130:21,
131:24, 145:7
AWAY [6] - 34:11,
45:15, 45:16, 89:9,
117:14, 161:19

B

BACHELOR'S [1] -
4:25
BACK [42] - 25:12,
25:13, 26:8, 26:21,
29:14, 33:3, 35:25,
36:17, 36:19, 37:10,
38:4, 38:9, 40:8,
54:8, 54:12, 55:13,
73:19, 88:21, 93:1,
96:4, 97:2, 99:17,
102:23, 105:13,
106:6, 106:21,
107:3, 115:10,
120:11, 121:9,
123:14, 124:21,
134:22, 141:4,
142:15, 146:12,
149:12, 150:15,
160:12, 160:13,
164:12
BACKGROUND [3] -
4:23, 81:21, 146:4
BACON [2] - 43:17,
58:6
BACON'S [1] - 70:4
BAD [1] - 41:9
BALANCE [1] - 152:10
BALANCES [1] -
152:22
BALLA [3] - 40:3,
40:5, 72:9
BALLA'S [2] - 72:3,

72:12
BALLPARK [1] -
49:14
BAPTIST [3] - 39:1,
40:2, 43:15
BAR [1] - 27:18
BASE [1] - 42:13
BASED [25] - 21:14,
22:16, 32:9, 39:23,
53:5, 55:15, 57:7,
63:21, 63:24, 67:6,
67:14, 67:16, 68:11,
73:16, 79:19, 88:10,
92:17, 111:6, 113:3,
115:23, 124:24,
128:22, 153:18,
154:7, 164:2
BASELINE [2] - 15:2,
15:23
BASIC [4] - 6:18, 27:9,
34:7, 111:18
BASICALLY [5] - 8:7,
25:21, 86:12, 136:6,
155:8
BASING [1] - 42:23
BASIS [4] - 6:25, 8:20,
11:16, 46:12
BATES [3] - 29:9,
29:25, 158:23
BE [144] - 3:8, 3:15,
6:14, 9:1, 10:20,
11:5, 11:6, 11:13,
11:19, 12:12, 18:11,
23:11, 23:16, 23:17,
23:22, 32:15, 33:10,
36:18, 37:24, 42:2,
46:9, 51:5, 52:18,
52:24, 53:7, 53:13,
55:10, 57:16, 58:1,
58:20, 60:22, 60:25,
61:8, 61:11, 61:12,
64:7, 64:8, 70:9,
71:9, 73:3, 73:21,
73:24, 75:7, 76:25,
77:4, 77:19, 77:24,
78:20, 79:12, 79:18,
83:13, 84:4, 84:14,
84:25, 85:3, 93:14,
94:10, 96:3, 97:1,
97:16, 98:8, 99:25,
100:7, 102:5,
105:21, 109:18,
109:21, 111:1,
112:17, 112:21,
113:24, 114:24,
115:12, 116:9,
117:13, 117:17,
117:20, 119:20,
121:4, 121:25,
122:1, 122:6, 123:1,

124:3, 124:8,
124:14, 124:15,
124:18, 129:9,
129:11, 129:24,
131:8, 131:12,
131:14, 134:22,
136:11, 136:19,
136:22, 136:23,
137:25, 139:16,
140:11, 141:22,
143:1, 143:13,
144:15, 145:13,
145:18, 145:22,
147:4, 147:16,
148:1, 148:17,
149:7, 149:16,
150:3, 152:1, 152:6,
152:23, 153:9,
153:18, 154:1,
154:9, 154:11,
156:8, 156:9,
156:14, 156:17,
157:1, 157:8, 159:6,
160:18, 160:22,
161:1, 161:14,
162:24, 163:8,
164:3, 164:4, 164:18
BEAR [1] - 11:7
BECAME [1] - 74:17
BECAUSE [54] - 6:22,
18:8, 18:12, 20:3,
23:7, 23:9, 23:13,
37:21, 38:16, 42:13,
43:4, 47:19, 53:2,
53:6, 56:18, 57:11,
57:20, 58:3, 89:25,
94:12, 121:13,
121:18, 122:13,
129:7, 131:9,
134:10, 135:2,
135:5, 135:13,
139:7, 139:11,
139:16, 139:19,
140:17, 141:3,
141:24, 143:15,
144:6, 145:22,
146:3, 146:20,
149:6, 149:11,
150:18, 152:5,
152:12, 155:1,
157:8, 158:7, 160:7,
160:14, 160:19,
162:3, 163:9
BECOME [2] - 9:25,
77:17
BECOMES [1] - 127:7
BEEN [36] - 5:21, 5:22,
9:23, 13:10, 19:9,
20:18, 23:14, 24:24,
25:1, 28:7, 31:16,
32:13, 33:12, 34:17,
37:7, 37:8, 43:4,
44:22, 48:20, 60:23,
74:1, 74:10, 81:4,
85:5, 103:11,
103:16, 112:15,
113:4, 131:21,
134:6, 137:14,
142:12, 147:10,
148:25, 160:16
BEFORE [28] - 1:11,
22:3, 45:18, 46:17,
47:14, 49:18, 50:17,
72:12, 76:2, 82:15,
86:6, 102:24,
105:19, 109:14,
118:1, 121:18,
121:21, 122:8,
123:3, 125:12,
127:3, 129:10,
134:25, 144:4,
144:7, 147:4,
162:19, 163:5
BEGIN [3] - 99:24,
100:6, 102:4
BEGINNING [4] -
41:20, 104:16,
106:3, 128:14
BEHAVIOR [7] -
53:14, 100:10,
102:9, 121:18,
122:17, 122:21,
124:10
BEHAVIORAL [1] -
34:18
BEHIND [1] - 161:25
BEING [17] - 17:23,
18:16, 20:5, 22:5,
31:24, 32:4, 53:1,
58:10, 58:25, 71:23,
75:2, 77:11, 118:2,
120:22, 121:22,
127:9, 133:20
BELIEVE [8] - 21:15,
22:17, 28:1, 67:17,
104:19, 119:20,
153:6, 163:13
BELOW [5] - 27:18,
69:21, 76:17, 151:2
BENCH [1] - 1:12
BENEFICIAL [2] -
12:19, 129:24
BENEFIT [4] - 12:22,
24:1, 75:2, 82:17
BENEFITTED [1] -
60:16
BEREA [5] - 28:11,
28:25, 29:4, 43:10,
75:21
BESIDE [1] - 142:12

BEST [3] - 83:19,
147:25, 148:16
BETTER [6] - 26:15,
26:17, 73:25, 74:25,
75:3, 141:10
BETWEEN [7] - 6:9,
19:13, 32:4, 57:11,
93:21, 114:5, 132:21
BEYOND [2] - 47:25,
151:25
BID [1] - 58:22
BIG [5] - 6:12, 74:17,
77:18, 88:8, 151:5
BIGGER [1] - 41:19
BILLING [1] - 17:6
BILLS [1] - 34:5
BIOCHEMICAL [1] -
22:6
BIOLOGICAL [1] -
63:23
BIOLOGY [1] - 76:4
BIT [23] - 3:13, 24:15,
27:6, 28:9, 28:13,
38:4, 39:2, 47:12,
47:13, 54:19, 54:23,
54:24, 62:9, 70:18,
70:20, 71:2, 96:18,
98:4, 111:18,
112:25, 113:20,
115:21, 118:6
BLANK [7] - 97:1,
100:1, 100:8, 102:6,
104:21, 141:6,
141:10
BLOCK [54] - 93:13,
93:15, 94:24, 95:3,
95:14, 95:15, 95:19,
96:25, 97:23, 97:25,
98:1, 98:7, 98:12,
98:13, 98:14, 98:19,
98:23, 99:4, 99:8,
100:12, 100:14,
100:19, 100:21,
100:23, 101:2,
101:6, 101:10,
101:14, 101:15,
101:21, 101:23,
102:9, 102:10,
102:11, 104:16,
104:18, 107:10,
107:16, 107:19,
107:20, 107:21,
108:4, 117:18,
118:9, 118:10,
118:11, 118:13,
118:15, 118:18,
119:17, 138:16
BLOCKS [18] - 93:19,
95:20, 98:9, 98:15,
98:17, 98:21, 98:25,

99:6, 99:10, 100:25,
101:4, 101:8,
101:12, 101:17,
107:15, 107:18,
114:5, 118:22
BLOOD [4] - 32:1,
50:8, 50:9, 77:20
BLUE [2] - 11:18,
148:18
BLUNT [1] - 156:8
BOARD [7] - 4:5, 5:13,
6:8, 80:8, 83:24,
83:25, 141:9
BOARDS [4] - 47:5,
83:16, 83:17, 111:8
BODY [3] - 40:20,
57:10, 57:18
BOOK [4] - 15:14,
134:15, 134:17,
134:18
BOTANY [2] - 76:9,
76:10
BOTH [19] - 7:2,
17:23, 67:5, 67:7,
75:12, 75:13,
128:20, 146:14,
151:18, 154:5,
155:20, 155:21,
156:7, 156:23,
158:1, 163:21,
164:4, 164:18
BOTTOM [9] - 66:25,
67:22, 119:19,
128:11, 140:10,
140:16, 140:19,
140:25, 142:2
BOX [4] - 56:2, 85:17,
85:19, 85:23
BRAG [1] - 162:23
BRAIN [5] - 5:15,
14:24, 15:1, 15:4,
75:7
BRAND [2] - 23:4,
24:4
BREAK [34] - 3:10,
32:3, 35:17, 79:18,
79:23, 79:24, 84:10,
84:12, 84:14, 84:17,
84:23, 84:25, 86:3,
93:21, 94:5, 94:6,
102:21, 107:25,
108:2, 108:5, 108:8,
108:11, 108:15,
108:17, 108:21,
108:24, 109:2,
109:5, 117:5, 117:7,
117:15, 141:20,
143:25, 144:3
BREAKS [4] - 32:7,
93:20, 114:5, 118:3
BREATH [1] - 32:6
BRIEF [15] - 13:16,
114:5, 149:9,
149:16, 149:25,
150:1, 150:2,
150:20, 151:9,
153:11, 153:12,
154:21, 156:7,
158:10
BRIEFING [13] -
149:4, 149:5,
150:19, 153:3,
154:14, 155:23,
155:25, 156:4,
156:22, 157:13,
157:19, 160:22
BRIEFINGS [1] -
146:13
BRIEFLY [3] - 72:13,
81:8, 81:15
BRIEFS [7] - 149:13,
150:3, 151:4,
151:21, 151:22,
152:2, 152:21
BRING [6] - 71:17,
123:14, 124:21,
132:2, 135:23,
147:21
BROAD [4] - 18:10,
18:13, 20:15, 25:22
BROADER [3] - 24:24,
25:24, 25:25
BROUGHT [2] -
137:21, 137:25
BUBBLES [1] - 148:19
BUG [1] - 31:4
BUILD [1] - 23:24
BUILDS [1] - 23:11
BUILT [2] - 67:19,
70:6
BUILT-IN [1] - 70:6
BURDEN [3] - 16:4,
32:11, 33:18
BURDENSOME [1] -
148:21
BURN [1] - 157:23
BUSINESS [5] - 3:6,
3:23, 88:18, 92:24,
164:9
BUSPAR [1] - 23:4
BUSPIRONE [6] -
13:2, 23:3, 23:4,
23:20, 23:23, 31:23
BUSY [1] - 42:4
BUT [144] - 6:13, 6:20,
8:23, 9:10, 9:18,
10:18, 11:9, 11:11,
12:14, 15:16, 17:13,
17:24, 20:20, 22:22,
23:12, 23:14, 24:10,
25:2, 25:7, 25:10,
26:1, 26:4, 26:11,
26:15, 26:17, 30:17,
31:3, 31:4, 33:14,
33:16, 35:6, 35:16,
37:7, 37:20, 39:10,
41:2, 41:3, 41:10,
41:13, 41:17, 42:8,
42:15, 43:5, 44:12,
46:7, 46:11, 47:11,
48:8, 50:11, 50:12,
51:2, 52:25, 53:2,
53:9, 54:3, 54:9,
56:18, 56:22, 57:12,
57:14, 58:25, 59:1,
59:4, 60:16, 61:15,
63:14, 63:23, 64:6,
67:18, 68:11, 70:3,
72:8, 72:10, 72:13,
75:2, 75:8, 75:13,
77:4, 78:1, 78:22,
89:7, 89:10, 89:18,
103:10, 103:21,
110:1, 110:5, 111:2,
111:4, 111:18,
112:11, 112:18,
114:10, 116:16,
124:23, 126:17,
127:17, 130:10,
131:4, 132:2, 132:7,
132:25, 133:15,
136:7, 136:11,
136:17, 136:23,
138:15, 139:9,
142:18, 145:3,
145:12, 146:14,
147:4, 148:12,
148:25, 149:6,
149:10, 149:12,
150:6, 150:23,
151:17, 151:25,
152:11, 152:22,
153:1, 153:5,
153:17, 154:13,
155:7, 155:14,
155:16, 156:3,
156:11, 156:19,
156:22, 158:10,
159:23, 160:25,
162:2, 162:23, 163:2
BUT.. [1] - 48:21
BUTTON [1] - 142:9
BY [100] - 1:22, 1:22,
4:20, 5:13, 7:20, 9:6,
10:22, 13:10, 13:17,
13:18, 15:1, 15:5,
16:25, 24:20, 24:25,
28:18, 33:13, 36:2,
42:25, 45:10, 48:11,
48:20, 49:2, 49:5,
50:14, 52:25, 53:1,
54:14, 58:15, 59:5,
60:25, 65:22, 68:22,
71:7, 71:13, 75:22,
78:18, 79:15, 80:23,
83:16, 85:11, 86:24,
87:10, 87:21, 88:7,
88:10, 88:17, 89:18,
90:4, 90:16, 91:2,
91:13, 91:24, 92:15,
92:23, 93:10, 93:11,
93:12, 93:15, 93:16,
94:18, 96:20,
103:13, 104:2,
105:12, 106:25,
109:5, 110:12,
113:8, 114:18,
116:8, 119:11,
123:12, 126:12,
128:7, 129:23,
130:7, 131:12,
133:12, 133:23,
134:13, 136:3,
136:13, 137:24,
139:12, 141:11,
141:14, 141:15,
141:16, 143:3,
144:14, 147:15,
148:7, 149:13,
153:9, 155:22,
165:4, 165:5, 165:7,
165:8

C

C'S [9] - 132:13,
132:15, 132:18,
140:6, 142:16,
142:17, 142:22,
142:23, 143:2
C.V [5] - 7:13, 145:8,
145:20, 145:22,
146:6
C.V.'S [1] - 145:9
CABINET [1] - 5:24
CALCULATING [1] -
132:18
CALENDAR [3] - 86:5,
93:22, 93:23
CALL [4] - 4:3, 17:12,
79:22, 144:23
CALLED [3] - 24:4,
70:8, 111:12
CALLS [3] - 4:6,
79:19, 80:9
CALMING [1] - 32:8
CAME [3] - 8:4, 96:24,
124:6
CAMERA [4] - 80:9,
103:10, 103:20,
103:21
CAN [221] - 4:15, 6:14,
7:21, 8:7, 9:1, 12:23,
14:10, 14:12, 14:15,
16:22, 22:11, 23:3,
24:14, 24:15, 25:13,
25:17, 25:18, 26:21,
28:9, 28:12, 28:14,
30:14, 32:3, 32:21,
33:4, 34:23, 35:25,
38:1, 41:20, 41:22,
47:7, 47:8, 50:12,
52:6, 52:7, 52:14,
53:20, 54:18, 54:19,
54:20, 54:23, 55:4,
55:13, 55:24, 56:1,
57:1, 57:6, 57:16,
58:20, 61:12, 61:14,
61:21, 62:7, 62:8,
62:18, 63:4, 63:5,
64:13, 64:15, 64:20,
66:6, 66:12, 66:18,
67:12, 67:20, 67:21,
68:13, 68:16, 69:6,
70:8, 70:11, 70:12,
70:16, 70:25, 71:16,
71:17, 71:22, 73:10,
75:15, 76:2, 76:3,
76:5, 76:8, 76:11,
77:17, 77:19, 77:24,
78:2, 78:5, 79:23,
80:9, 80:14, 80:18,
81:8, 83:13, 84:24,
85:2, 85:4, 85:7,
86:15, 87:11, 88:21,
88:22, 88:23, 90:17,
91:3, 91:14, 93:3,
93:4, 93:6, 94:16,
94:17, 94:18, 95:11,
96:9, 96:12, 96:18,
96:19, 97:19, 98:2,
98:3, 98:4, 99:12,
99:17, 99:18, 100:2,
101:25, 102:13,
103:15, 104:3,
104:8, 104:9,
104:14, 104:23,
106:22, 107:1,
107:3, 107:17,
112:5, 113:9,
113:12, 113:13,
113:14, 113:17,
113:19, 113:22,
113:24, 114:7,
114:9, 114:19,
114:25, 115:1,
115:14, 115:15,
115:16, 115:18,
115:21, 115:22,
116:2, 116:22,
116:25, 118:5,
118:7, 118:15,

118:24, 119:6,
119:23, 120:5,
120:6, 121:15,
122:11, 123:6,
123:10, 123:14,
125:14, 125:20,
126:5, 127:2,
127:25, 128:8,
128:10, 131:17,
135:8, 136:4, 137:7,
137:13, 140:14,
140:25, 142:10,
142:14, 146:17,
146:18, 147:19,
147:21, 149:21,
149:23, 151:25,
152:15, 152:24,
154:9, 155:3, 158:6,
158:24, 160:12,
162:5, 162:21,
163:25
CAN'T [8] - 34:4,
42:13, 43:2, 58:10,
70:18, 89:17,
109:14, 147:23
CANDIDATE [1] -
85:20
CANDIDATE'S [1] -
85:21
CANNOT [6] - 36:16,
61:8, 61:11, 77:1,
77:2, 160:24
CAPACITIES [1] -
120:21
CAPACITY [1] - 64:24
CAPTURED [2] -
88:10, 92:18
CARE [3] - 31:22,
51:14, 146:25
CAREER [1] - 163:11
CAROLINE [1] - 2:2
CARRIED [1] - 84:25
CARRY [1] - 84:16
CASE [29] - 1:3, 4:2,
6:19, 44:3, 44:15,
55:19, 57:14, 79:1,
79:7, 94:12, 101:18,
106:11, 112:23,
117:17, 122:20,
123:24, 135:20,
135:24, 136:13,
136:15, 137:14,
143:3, 144:23,
153:13, 155:1,
158:7, 159:6, 160:1
CASES [4] - 6:14,
45:22, 151:16,
153:10
CATCHALL [1] - 17:11
CATEGORY [2] -
15:13, 29:16
CAUCASIANS [1] -
63:13
CAUSE [2] - 16:11,
42:11
CAUSED [1] - 19:10
CAUSES [2] - 11:14,
63:23
CAUSING [1] - 20:23
CBSSA [12] - 111:24,
112:3, 113:24,
115:1, 115:2,
116:10, 128:9,
128:16, 128:18,
128:22, 129:3, 130:1
CBSSA'S [5] - 111:16,
113:19, 116:24,
138:14, 140:5
CELL [1] - 108:4
CENTER [3] - 134:19,
135:12, 144:7
CENTRIFUGE [1] -
50:10
CEREMONIAL [1] -
145:3
CERTAIN [4] - 68:7,
131:9, 140:5, 153:9
CERTAINLY [3] -
14:12, 77:2, 78:2
CERTIFIED [1] - 5:13
CERTIFY [1] - 164:20
CHALLENGE [2] -
145:17, 145:22
CHALLENGING [1] -
33:23
CHAMBERS [2] -
147:14, 162:4
CHANCE [12] - 29:13,
96:13, 104:12,
105:6, 133:1, 143:5,
143:17, 145:23,
152:22, 155:17,
156:23, 162:3
CHANGE [23] - 8:4,
14:10, 14:12, 14:13,
22:7, 31:21, 32:10,
32:13, 36:17, 37:2,
37:11, 71:8, 74:7,
99:2, 101:23, 126:3,
126:5, 126:16,
126:20, 126:24,
127:4, 127:13,
142:25
CHANGED [4] - 31:25,
32:15, 71:9, 120:8
CHANGES [3] - 15:6,
22:6, 120:17
CHANGING [2] -
128:23, 138:19
CHAOTIC [1] - 34:6
CHART [1] - 28:12
CHEAT [1] - 130:1
CHECK [1] - 54:5
CHEMISTRY [2] -
76:6, 76:20
CHIEF [2] - 79:1,
136:15
CHILDREN [2] -
57:17, 65:7
CHOICE [9] - 23:9,
93:19, 106:12,
118:20, 120:17,
121:10, 124:6,
124:7, 124:16
CHOICES [2] - 120:8,
140:15
CHOOSING [1] -
159:24
CHOSE [4] - 17:9,
32:10, 139:3, 156:19
CHRISTINA [1] - 43:17
CHRISTINE [1] - 40:3
CHUNK [2] - 155:4,
155:5
CIRCUMSTANCES [7]
- 14:11, 14:13, 22:6,
35:6, 40:18, 63:25,
130:15
CITATIONS [3] -
149:21, 151:1,
151:11
CITE [1] - 151:13
CIVIL [4] - 1:3, 6:13,
45:24, 46:9
CK [16] - 83:1, 83:2,
83:6, 84:18, 84:19,
91:16, 106:8,
106:11, 106:13,
106:15, 106:17,
106:21, 107:5,
107:12, 108:14,
108:20
CLAIM [1] - 35:9
CLAIMED [6] - 18:23,
18:25, 19:20, 33:9,
33:25, 40:12
CLAIMING [1] - 19:18
CLAIMS [2] - 33:10,
46:8
CLARIFICATION [2] -
64:6, 105:9
CLARIFY [8] - 36:3,
49:10, 52:21, 74:5,
123:10, 126:5,
135:8, 136:4
CLARIFYING [1] -
48:4
CLASS [1] - 76:3
CLAUSE [1] - 94:10
CLEAN [1] - 34:4
CLEAR [11] - 19:14,
24:25, 36:24, 84:14,
119:8, 122:7, 123:1,
124:4, 127:23,
160:16
CLEARLY [2] - 10:13,
18:19
CLERK [2] - 3:1,
161:17
CLERK'S [1] - 147:1
CLERKSHIPS [2] -
82:16, 83:4
CLICK [1] - 103:18
CLINIC [8] - 7:6, 12:7,
13:24, 13:25, 22:20,
31:23, 51:11, 74:19
CLINICAL [18] - 10:23,
11:8, 11:20, 12:2,
13:3, 19:12, 23:25,
32:12, 32:17, 42:4,
55:7, 57:5, 67:5,
67:7, 82:15, 83:4,
83:5, 106:15
CLINICIAN [10] -
12:18, 12:23, 13:13,
14:1, 14:5, 22:19,
52:25, 53:3, 54:7,
60:15
CLINICIAN'S [1] -
12:12
CLINICIANS [3] -
12:5, 12:6, 15:14
CLINICS [6] - 7:2,
29:12, 30:2, 30:15,
43:13, 74:19
CLOCK [5] - 97:1,
97:6, 99:25, 100:7,
102:5
CLOSE [3] - 43:3,
48:22, 119:23
CLOSED [6] - 86:4,
94:14, 102:11,
134:14, 134:17,
134:18
CLOSER [1] - 69:25
CLOSES [1] - 143:4
CO [1] - 65:9
CO-MORBID [1] - 65:9
COACH [1] - 140:20
COCAINE [1] - 75:8
CODE [11] - 16:4,
17:5, 17:13, 17:15,
17:16, 17:17, 17:18,
17:20, 25:21, 25:24,
25:25
CODES [1] - 17:6
COGNITION [1] - 15:6
COGNITIVE [5] - 15:8,
16:12, 26:19, 34:10,
41:17
COIE [1] - 2:2
COLLATERAL [1] -
42:1
COLLEAGUES [1] -
49:21
COLLECT [1] - 131:22
COLLECTS [1] - 120:8
COLLEGE [10] - 5:1,
28:11, 28:25, 29:4,
43:10, 73:24, 74:21,
75:20, 75:21, 106:15
COLORED [1] -
148:17
COLUMN [11] - 89:6,
89:14, 93:15, 94:18,
107:16, 108:2,
118:11, 118:16,
123:19, 124:5,
158:20
COLUMNS [2] - 120:5,
138:2
COMBINED [1] - 69:8
COME [6] - 28:9,
74:18, 80:9, 134:22,
156:11, 160:12
COMES [3] - 8:22,
13:24, 150:15
COMFORTABLE [1] -
26:2
COMING [2] - 53:11,
148:12
COMMENDED [1] -
164:4
COMMENT [1] -
148:19
COMMON [9] - 8:23,
11:10, 20:10, 46:10,
53:10, 63:23, 71:6,
102:13, 120:23
COMMONLY [5] -
11:19, 12:10, 12:15,
42:6, 57:19
COMP [1] - 46:8
COMPANIES [1] -
13:11
COMPARABILITY [5]
- 127:16, 131:14,
133:13, 133:16,
133:25
COMPARABLE [2] -
127:7, 127:11
COMPARED [9] -
16:14, 27:25, 41:7,
42:12, 42:16, 44:19,
69:14, 111:5, 153:22
COMPARING [4] -
42:25, 43:1, 132:19,
136:21
COMPETENCY [3] -
5:25, 6:11, 46:13

COMPILES [1] - 66:24
COMPLAINING [2] - 25:25, 42:15
COMPLAINT [1] - 42:13
COMPLAINTS [7] - 24:7, 26:4, 32:10, 42:7, 42:22, 67:16, 67:18
COMPLETE [13] - 30:18, 30:23, 33:22, 94:15, 122:7, 129:9, 134:24, 144:15, 146:15, 147:1, 147:5, 147:15, 161:10
COMPLETED [5] - 5:2, 37:3, 85:21, 93:24, 116:18
COMPLETELY [2] - 115:3, 144:14
COMPLETENESS [5] - 26:25, 30:17, 31:7, 83:7, 101:17
COMPLETES [1] - 86:10
COMPLETING [2] - 138:16, 149:2
COMPLEX [1] - 63:14
COMPONENT [4] - 6:12, 6:13, 41:17, 57:12
COMPONENTS [2] - 73:11, 133:18
COMPREHENSIVE [3] - 27:9, 111:17, 111:18
COMPULSIVE [1] - 63:21
COMPUTER [6] - 1:22, 1:22, 68:6, 130:15, 130:19, 133:23
COMPUTER-AIDED [1] - 1:22
CONCENTRATING [1] - 65:3
CONCENTRATION [6] - 24:7, 25:23, 34:21, 49:24, 74:9, 77:6
CONCEPTS [1] - 81:17
CONCERN [1] - 67:5
CONCERNING [1] - 47:22
CONCLUDING [1] - 105:2
CONCLUSION [1] - 144:23
CONCLUSIONS [3] - 149:18, 150:20, 151:1
CONDITION [5] - 14:9, 16:10, 24:9, 26:2
CONDITIONS [11] - 12:1, 64:14, 72:6, 83:25, 114:3, 114:8, 114:22, 115:11, 127:12, 128:20, 128:24
CONDUCTED [2] - 49:8, 52:24
CONFER [2] - 147:5, 148:5
CONFERENCE [1] - 3:7
CONFIDENCE [2] - 3:17, 65:7
CONFIDENT [2] - 115:24, 120:12
CONJUNCTION [1] - 113:24
CONNECTION [1] - 19:13
CONNOR'S [1] - 50:17
CONNORS [1] - 68:11
CONSEQUENCES [1] - 64:18
CONSIDER [6] - 12:14, 46:1, 59:3, 73:7, 153:7, 157:10
CONSIDERED [4] - 57:13, 57:17, 57:21, 164:3
CONSIDERING [3] - 17:24, 41:1, 83:20
CONSISTENT [25] - 29:23, 97:8, 97:24, 98:8, 98:9, 98:12, 98:15, 98:17, 98:20, 98:22, 98:24, 99:5, 99:9, 100:5, 100:9, 100:20, 100:24, 101:3, 101:7, 101:11, 101:16, 101:19, 102:8, 105:23, 106:4
CONSTANT [1] - 62:23
CONSTANTLY [1] - 33:13
CONSTITUTIONAL [1] - 6:19
CONSTRUCT [1] - 131:19
CONTAINED [2] - 93:12, 120:24
CONTAINS [3] - 85:19, 85:24, 111:10
CONTEMPORANEOUS [1] - 82:18
CONTENT [3] - 82:22, 82:24, 129:12
CONTEXT [2] - 96:15, 138:5
CONTINUATION [1] - 50:22
CONTINUE [1] - 156:11
CONTINUED [1] - 2:1
CONTINUES [2] - 39:11, 71:3
CONTINUOUS [2] - 49:24, 68:5
CONTRADICTORY [1] - 34:14
CONTRIBUTE [1] - 65:4
CONTROL [2] - 33:19, 141:1
CONTROLLED [8] - 33:15, 35:9, 38:18, 38:23, 39:12, 41:15, 41:18, 71:4
CONVENIENCE [2] - 62:10, 113:21
CONVEY [1] - 162:4
CONVEYED [1] - 94:19
CONVINCE [1] - 153:15
COPY [1] - 7:13
CORNER [1] - 54:20
CORNERS [1] - 164:13
CORRECT [42] - 7:12, 46:23, 50:15, 51:21, 55:20, 56:9, 56:12, 56:24, 61:5, 61:19, 63:2, 66:10, 72:4, 72:12, 73:5, 73:18, 73:21, 77:6, 77:9, 77:12, 92:3, 95:6, 105:6, 110:17, 110:21, 117:10, 117:11, 117:24, 118:4, 119:24, 124:1, 125:24, 127:14, 134:22, 135:15, 138:20, 143:1, 143:6, 143:18, 161:11, 164:20
CORRECTIONS [2] - 147:6, 147:8
CORRECTNESS [1] - 138:18
CORRELATE [1] - 137:23
CORRELATES [2] - 27:13, 35:4
COST [3] - 159:5, 159:11, 160:3
COULD [27] - 4:12, 14:13, 47:7, 53:7, 64:7, 77:4, 93:11, 94:9, 96:3, 104:12, 114:24, 116:9, 118:6, 120:10, 121:7, 121:8, 122:6, 124:18, 126:9, 127:22, 128:13, 136:9, 139:16, 157:18, 161:1, 161:24, 161:25
COUNSEL [3] - 2:4, 109:16, 122:24
COUNSELOR [2] - 25:3, 31:13
COUNT [2] - 79:15, 94:8
COUNTED [1] - 141:7
COUNTER [6] - 94:3, 148:4, 148:9, 148:18, 148:23, 151:13
COUNTRY [1] - 64:10
COUPLE [8] - 10:25, 21:15, 78:16, 79:19, 128:5, 130:6, 158:13, 163:16
COURSE [8] - 20:18, 22:8, 25:2, 88:17, 92:24, 94:9, 95:22, 146:14
COURT [127] - 1:1, 1:18, 3:1, 3:2, 3:5, 3:13, 3:22, 4:2, 4:7, 4:9, 4:11, 4:15, 7:17, 10:10, 10:20, 35:11, 35:15, 35:20, 35:23, 45:5, 45:8, 45:18, 45:21, 48:7, 48:22, 53:20, 58:8, 65:19, 78:13, 78:16, 78:18, 79:4, 79:11, 79:14, 79:17, 79:25, 80:5, 80:10, 80:12, 80:14, 80:18, 86:21, 87:7, 87:18, 88:4, 90:13, 90:24, 91:10, 91:21, 92:12, 102:20, 102:25, 103:2, 103:6, 103:13, 103:16, 103:25, 106:24, 109:9, 109:12, 109:16, 110:9, 112:9, 112:17, 114:15, 116:5, 116:24, 121:15, 122:8, 122:10, 123:3, 123:6, 123:8, 124:3, 124:14, 126:9, 128:3, 129:16, 129:21, 130:5, 130:7, 132:24, 133:7, 134:5, 134:8, 135:19, 135:23, 136:1, 136:6, 137:3, 137:8, 137:13, 137:20, 141:11, 143:19, 144:17, 144:22, 145:2, 145:11, 145:16, 146:3, 146:9, 150:15, 150:22, 152:4, 152:8, 153:7, 155:10, 158:19, 159:7, 159:10, 159:17, 159:19, 160:21, 161:5, 161:14, 161:21, 162:2, 162:7, 162:18, 162:23, 163:5, 164:8, 164:12, 164:18, 164:19, 164:24
COURT'S [1] - 159:12
COURTHOUSE [1] - 1:19
COURTROOM [1] - 163:17
COURTS [1] - 156:10
COVERED [1] - 82:22
CP3 [1] - 50:17
CRAMMING [1] - 74:12
CREATED [1] - 37:5
CREATES [1] - 89:8
CREDIT [1] - 163:21
CRIMINAL [7] - 5:25, 6:1, 6:10, 6:11, 7:8, 45:22, 46:11
CRITERIA [9] - 8:1, 8:4, 8:5, 8:16, 13:3, 34:1, 42:9, 60:17, 74:20
CRITICAL [1] - 42:8
CROSS [10] - 45:6, 45:9, 109:10, 109:20, 110:11, 112:18, 112:19, 134:12, 144:19, 165:2
CROSS-EXAMINATION [2] - 45:9, 110:11
CROSS-EXAMINE [1] - 144:19
CROWD [1] - 18:16

CROWDS [1] - 20:8
CRUISE [1] - 150:11
CRUNCHED [1] - 142:2
CULTURE [4] - 63:15, 63:16, 63:21, 63:25
CULTURES [1] - 64:1
CUMBERSOME [1] - 148:22
CUMULATIVE [1] - 94:8
CURED [2] - 61:8, 61:11
CURIOUS [1] - 131:4
CURRENT [12] - 22:25, 24:11, 38:15, 39:5, 39:10, 39:17, 40:18, 52:4, 57:2, 71:4, 81:1, 84:2
CURRENTLY [2] - 5:18, 84:3
CURRICULUM [2] - 82:22, 83:5
CUT [1] - 151:6
CVS [1] - 27:12
CYCLE [2] - 32:4, 32:7

D

D2 [1] - 18:2
DAILY [4] - 8:20, 23:19, 58:5, 139:23
DANGEROUSNESS [1] - 6:15
DANIEL [5] - 80:9, 80:16, 80:20, 165:6
DATA [60] - 42:1, 82:7, 83:21, 85:15, 86:7, 86:9, 88:10, 88:11, 88:12, 88:14, 88:17, 88:23, 88:25, 89:7, 89:12, 89:15, 89:21, 90:5, 90:7, 90:18, 91:4, 91:15, 92:1, 92:6, 92:17, 92:23, 94:19, 96:7, 97:4, 97:8, 97:14, 97:19, 98:6, 98:14, 98:20, 98:24, 99:5, 99:9, 99:15, 99:16, 100:3, 101:3, 101:7, 101:11, 101:15, 101:19, 102:3, 102:7, 104:4, 104:6, 105:14, 105:16, 105:19, 105:23, 105:25, 106:13, 107:14, 122:22, 131:22, 136:21
DATE [16] - 22:4, 36:5,

36:11, 36:20, 36:25, 55:19, 55:22, 55:25, 56:3, 94:21, 94:22, 115:15, 148:7, 158:17, 164:24
DATES [10] - 36:3, 73:19, 146:21, 146:22, 149:22, 149:23, 150:9, 160:5, 160:11, 160:13
DAY [27] - 1:12, 8:14, 11:16, 14:16, 23:11, 23:17, 23:23, 31:24, 36:12, 36:13, 37:8, 37:12, 37:18, 38:19, 39:7, 39:8, 56:20, 58:23, 77:25, 86:1, 92:18, 108:1
DAY-TO-DAY [1] - 11:16
DAYS [10] - 13:9, 37:15, 37:19, 51:11, 65:13, 79:1, 150:11, 159:18, 162:17
DAYTIME [3] - 86:1, 94:3, 94:7
DC [1] - 2:3
DECEMBER [1] - 27:13
DECIDE [2] - 121:2, 160:6
DECIDED [1] - 146:12
DECISION [3] - 83:20, 163:25, 164:2
DECLARATION [13] - 43:20, 43:23, 96:10, 99:18, 104:8, 119:6, 122:24, 132:19, 136:21, 137:22, 141:14, 141:15, 141:16
DECLINED [1] - 156:18
DECREASE [3] - 19:5, 78:3, 97:17
DECREASED [2] - 34:21, 40:21
DEFENDANT [17] - 2:4, 7:15, 49:6, 147:13, 148:8, 149:8, 149:10, 149:13, 149:14, 149:17, 150:1, 150:4, 150:12, 151:10, 152:10, 159:25
DEFENDANTS [3] - 1:7, 5:25, 152:14
DEFENSE [12] - 4:13,

7:18, 80:16, 86:22, 87:8, 87:19, 88:5, 90:14, 90:25, 91:11, 91:22, 92:13
DEFICIT [2] - 25:23, 69:7
DEFICIT-HYPERACTIVITY [1] - 69:7
DEFICITS [1] - 24:8
DEFINE [1] - 40:25
DEFINITELY [3] - 46:11, 54:8, 103:18
DEFINITION [1] - 42:25
DEFINITIVE [1] - 158:22
DEGREE [4] - 4:25, 77:2, 105:3, 105:23
DEGREES [2] - 11:3, 107:19
DELIVERY [1] - 130:15
DEMAND [1] - 34:10
DEMOGRAPHICS [1] - 51:5
DEMONSTRATE [1] - 27:23
DEMONSTRATES [1] - 29:21
DENIED [1] - 156:19
DEPARTMENT [3] - 3:14, 5:21, 81:13
DEPEND [2] - 124:11, 154:18
DEPENDING [5] - 14:11, 14:12, 14:14, 16:9, 22:5
DEPENDS [2] - 41:24, 53:21
DEPOSITION [6] - 70:4, 148:2, 148:3, 148:13, 148:16, 158:23
DEPRESSED [2] - 34:22, 35:6
DEPRESSION [8] - 6:5, 13:12, 13:14, 13:19, 29:17, 33:15, 38:17, 63:20
DEPRESSION/ANXIETY [1] - 39:9
DEPTH [1] - 31:14
DEPUTY [1] - 3:16
DERMATOLOGIST [2] - 54:12, 54:15
DERMATOLOGY [2] - 22:13, 22:20
DESCENT [4] - 63:7, 63:9, 63:12, 63:17

DESCRIBE [2] - 21:16, 32:11
DESCRIBED [10] - 15:17, 16:7, 33:17, 33:18, 40:19, 41:11, 63:23, 100:21, 101:4, 121:18
DESCRIBES [3] - 19:7, 21:3, 40:17
DESCRIBING [1] - 41:3
DESCRIPTION [11] - 16:3, 20:11, 22:21, 25:10, 31:1, 33:6, 40:15, 143:7, 158:16, 158:21, 158:22
DESCRIPTIONS [1] - 147:18
DESERVE [1] - 164:1
DESIGNATION [2] - 148:18
DESIGNATIONS [7] - 148:2, 148:4, 148:8, 148:9, 148:23
DESIGNED [1] - 111:24
DESIRE [1] - 25:4
DESPITE [1] - 96:23
DETAILS [1] - 158:4
DETERMINE [1] - 8:6
DETERMINING [1] - 73:4
DEVELOP [1] - 111:20
DEVELOPED [1] - 95:17
DEVELOPMENT [1] - 81:18
DEVELOPMENTAL [2] - 72:16, 72:19
DEVELOPS [1] - 111:22
DEVIATION [1] - 69:21
DEXTROAMPHETAMINE [1] - 24:3
DEXTROAMPHETAMINE-AMPHETAMINE [1] - 24:3
DIAGNOSE [4] - 21:2, 21:11, 22:23, 40:5
DIAGNOSED [7] - 24:22, 24:24, 25:16, 26:6, 64:8, 69:16, 73:17
DIAGNOSES [13] - 8:6, 18:12, 25:9, 42:6, 52:20, 52:23, 55:19, 55:20, 56:6, 57:6, 60:14, 61:1,

74:22
DIAGNOSING [2] - 49:16, 51:24
DIAGNOSIS [48] - 11:8, 11:20, 13:3, 15:8, 15:10, 15:12, 16:1, 16:4, 16:9, 17:5, 17:10, 18:7, 18:11, 19:2, 19:13, 19:15, 19:17, 19:20, 19:21, 20:16, 22:18, 22:19, 24:25, 25:4, 25:20, 25:22, 25:23, 26:4, 26:10, 32:25, 34:12, 34:15, 38:6, 39:18, 39:19, 41:2, 41:3, 42:9, 42:10, 42:17, 50:6, 50:12, 52:16, 53:14, 54:13, 55:15, 56:9, 74:17
DIAGNOSTIC [14] - 7:23, 8:1, 8:2, 8:15, 13:17, 14:8, 17:6, 17:16, 17:17, 34:1, 49:15, 50:2, 62:5, 69:3
DICTIONARY [1] - 8:7
DID [50] - 18:23, 23:16, 28:2, 32:25, 33:2, 38:6, 43:17, 43:19, 43:20, 43:22, 43:23, 44:1, 44:2, 44:5, 44:7, 44:9, 46:15, 78:25, 84:12, 89:14, 89:18, 94:2, 94:4, 100:4, 105:7, 105:25, 107:14, 107:25, 108:8, 108:15, 108:21, 109:2, 112:19, 112:21, 115:18, 122:25, 125:6, 129:17, 132:17, 132:20, 134:8, 137:23, 139:19, 141:16, 141:23, 143:23, 145:8, 145:12, 156:9, 163:21
DIDN'T [7] - 78:19, 137:9, 138:4, 142:4, 142:18, 145:12, 163:8
DIFFERENCE [1] - 57:11
DIFFERENT [33] - 6:22, 6:23, 9:22, 11:9, 46:6, 46:23, 47:20, 48:3, 51:7, 56:15, 60:5, 60:25,

63:24, 64:3, 68:10,
71:12, 85:13, 93:17,
106:2, 110:20,
120:21, 133:17,
133:23, 136:7,
138:6, 139:4, 141:9,
144:8, 153:15,
154:2, 154:10,
163:15

DIFFERENTLY ^[1] -
57:9

DIFFICULT ^[2] -
111:1, 114:10

DIFFICULTIES ^[1] -
16:13

DIFFICULTY ^[5] -
20:7, 20:8, 34:12,
65:3, 160:23

DIFFUSELY ^[1] - 15:3

DIRECT ^[9] - 4:19,
45:4, 48:1, 80:22,
112:8, 112:11,
112:20, 113:1, 165:2

DIRECTLY ^[3] - 16:7,
18:8, 19:10

DIRECTOR ^[1] -
140:21

DISABILITIES ^[1] -
21:20

DISABILITY ^[8] - 6:16,
19:13, 21:14, 22:16,
42:25, 43:10, 65:13,
78:23

DISABILITY-BASED
^[2] - 21:14, 22:16

DISABLED ^[2] - 18:11,
65:11

DISADVANTAGED ^[1]
- 133:23

DISAGREE ^[1] -
151:13

DISCIPLINARY ^[1] -
84:1

DISCONTINUING ^[1] -
154:6

DISCOVERY ^[1] -
137:25

DISCUSS ^[1] - 155:3

DISCUSSED ^[5] -
27:22, 40:16, 86:3,
124:12, 159:5

DISCUSSING ^[4] -
104:11, 106:7,
106:16, 107:4

DISCUSSION ^[2] -
31:11, 96:20

DISFUNCTION ^[1] -
34:2

DISORDER ^[31] - 8:9,
12:2, 13:4, 17:4,
18:25, 20:1, 20:4,
20:5, 33:1, 41:22,
54:4, 61:5, 61:7,
61:13, 62:2, 62:12,
62:20, 62:22, 63:8,
63:18, 63:20, 64:18,
65:6, 65:8, 65:11,
65:12, 69:7, 69:13,
72:16, 72:20

DISORDERS ^[3] -
7:23, 8:13, 65:10

DISPLAY ^[1] - 63:24

DISPROPORTIONAT
ELY ^[1] - 64:11

DISPUTE ^[1] - 147:23

DISPUTES ^[1] -
147:20

DISTINCTION ^[1] -
127:15

DISTRACTABILITY
^[2] - 18:16, 41:12

DISTRACTIVE ^[1] -
50:22

DISTRESS ^[3] - 12:10,
62:22, 65:9

DISTRESSING ^[1] -
12:8

DISTRIBUTE ^[1] -
117:16

DISTRIBUTED ^[1] -
105:21

DISTRIBUTION ^[1] -
132:21

DISTRICT ^[2] - 1:1, 1:2

DISTURBANCE ^[1] -
34:22

DISTURBED ^[1] - 65:3

DIVA ^[1] - 51:1

DJX ^[9] - 165:11,
165:12, 165:12,
165:13, 165:13,
165:14, 165:14,
165:15, 165:15

DO ^[185] - 3:22, 5:11,
5:12, 6:2, 6:3, 7:1,
7:6, 7:8, 8:11, 8:24,
9:5, 9:12, 9:18, 9:22,
11:16, 11:24, 12:11,
12:25, 14:24, 19:16,
21:20, 21:21, 22:17,
22:25, 24:21, 25:15,
26:5, 26:7, 26:11,
34:7, 35:24, 36:18,
41:7, 42:9, 44:16,
45:3, 50:10, 50:13,
51:11, 52:9, 52:11,
52:12, 57:2, 57:10,
59:9, 59:10, 59:16,
59:19, 61:23, 62:4,
62:6, 62:20, 63:9,
63:11, 64:17, 64:24,
66:1, 66:3, 66:4,
66:9, 66:11, 66:16,
67:23, 68:1, 68:3,
68:4, 69:3, 69:5,
70:13, 70:15, 70:17,
70:21, 70:23, 70:24,
71:2, 71:19, 71:21,
71:22, 71:25, 72:1,
74:14, 74:16, 74:20,
74:21, 74:22, 75:3,
75:16, 75:17, 76:6,
76:9, 76:12, 76:17,
76:18, 76:20, 79:20,
79:21, 82:10, 82:12,
82:25, 83:22, 84:12,
85:1, 89:15, 89:25,
92:5, 102:18,
103:19, 104:22,
109:7, 111:20,
112:25, 114:8,
114:11, 117:1,
118:9, 118:18,
119:3, 120:2, 121:3,
123:16, 123:19,
125:3, 125:9,
125:24, 126:18,
129:14, 130:12,
131:10, 132:7,
132:9, 132:12,
136:2, 136:7, 137:4,
137:5, 138:17,
139:6, 139:15,
140:6, 140:8,
141:14, 142:4,
142:19, 143:9,
143:11, 144:5,
145:9, 148:15,
148:16, 148:20,
149:4, 149:5, 149:6,
151:18, 151:25,
152:11, 152:12,
153:11, 154:8,
155:21, 156:11,
157:12, 157:14,
158:15, 159:7,
159:15, 159:22,
160:2, 160:9,
161:12, 161:13,
161:18, 161:24,
162:3, 162:5, 162:8,
162:10, 162:11,
162:13, 162:21,
164:13

DOCKET ^[7] - 145:17,
147:14, 148:8,
161:13, 161:14,
161:16, 161:20

DOCTOR ^[3] - 51:14,
53:22, 140:20

DOCTORATE ^[1] -
81:23

DOCUMENT ^[52] -
27:15, 29:5, 30:12,
33:4, 36:8, 36:12,
37:6, 38:3, 47:10,
47:16, 48:23, 49:4,
52:7, 52:10, 52:18,
61:23, 66:1, 67:10,
70:11, 70:14, 70:25,
71:20, 72:12, 75:16,
75:20, 85:7, 85:10,
86:16, 90:6, 94:25,
95:16, 99:12, 112:5,
113:9, 113:13,
113:14, 115:10,
115:22, 117:2,
119:3, 120:2,
121:21, 122:1,
122:8, 123:14,
124:5, 124:21,
125:20, 128:1,
137:23, 138:3, 139:1

DOCUMENTATION
^[12] - 10:8, 10:16,
27:20, 28:2, 42:2,
49:4, 50:14, 53:11,
72:4, 72:12, 72:20,
154:3

DOCUMENTED ^[1] -
49:20

DOCUMENTS ^[11] -
28:6, 34:17, 71:13,
85:2, 88:9, 88:20,
120:15, 123:2,
142:20, 147:18,
158:23

DOES ^[94] - 11:19,
14:21, 15:13, 16:10,
17:13, 18:12, 19:7,
21:1, 21:3, 21:9,
21:12, 21:16, 21:23,
22:14, 22:17, 22:23,
23:12, 23:18, 23:23,
24:10, 25:2, 26:1,
26:18, 27:8, 27:15,
27:23, 28:1, 28:19,
28:21, 28:24, 28:25,
29:2, 29:5, 29:16,
32:10, 32:14, 32:17,
32:24, 33:6, 33:21,
33:22, 33:24, 35:3,
36:9, 36:20, 36:21,
37:1, 37:6, 38:11,
38:19, 39:4, 39:14,
39:22, 40:5, 40:7,
40:10, 41:13, 42:9,
42:24, 58:22, 60:16,
71:8, 73:1, 74:20,
82:5, 86:7, 95:24,
97:4, 98:6, 98:14,
99:2, 100:9, 100:17,
102:3, 103:11,
105:16, 105:23,
107:13, 122:13,
126:2, 127:13,
127:17, 130:12,
133:15, 135:14,
135:23, 139:14,
139:22, 153:19,
154:18

DOESN'T ^[2] - 8:4,
58:4

DOG ^[3] - 31:12,
76:16, 76:21

DOING ^[17] - 3:15, 7:2,
9:9, 9:23, 11:15,
41:21, 41:25, 45:12,
46:12, 50:13, 52:20,
53:22, 103:16,
110:14, 136:23,
152:11

DON'T ^[71] - 3:9, 3:17,
17:11, 20:19, 21:4,
21:8, 21:15, 28:1,
34:5, 42:14, 42:15,
42:17, 42:18, 44:22,
47:15, 47:18, 48:19,
48:20, 50:2, 50:9,
50:18, 53:2, 53:5,
70:1, 70:9, 77:1,
77:4, 79:17, 79:25,
102:19, 103:10,
103:21, 105:21,
113:4, 114:9,
122:16, 122:21,
124:23, 132:1,
132:6, 133:14,
135:2, 135:3,
136:13, 136:16,
136:17, 136:22,
140:17, 141:9,
144:20, 145:2,
145:11, 145:13,
145:16, 145:21,
153:8, 153:10,
153:11, 154:12,
154:20, 155:24,
157:22, 157:24,
158:3, 158:10,
160:15, 162:2,
162:20, 162:21,
162:23, 163:9

DONE ^[4] - 17:20,
46:3, 68:22, 164:1

DOOR ^[1] - 48:3

DOPAMINE ^[2] - 75:6,
75:10

DOSAGE ^[5] - 56:12,
56:14, 57:25, 58:17,
59:4

DOSAGES [1] - 71:8
DOSES [1] - 57:19
DOSING [1] - 77:25
DOT [1] - 142:12
DOUBLE [2] - 54:5, 154:25
DOUBT [4] - 64:9, 67:9, 69:9, 148:11
DOWN [66] - 3:18, 7:21, 17:21, 17:24, 22:24, 28:11, 29:12, 30:6, 30:11, 30:24, 31:7, 32:24, 33:4, 34:16, 34:24, 38:1, 38:9, 40:4, 40:9, 41:20, 45:13, 47:13, 52:7, 54:23, 57:1, 62:18, 64:15, 66:6, 66:12, 67:20, 67:21, 68:24, 68:25, 70:17, 70:25, 71:23, 76:5, 96:11, 96:17, 96:18, 97:20, 99:12, 101:14, 104:9, 104:14, 104:25, 106:22, 107:1, 108:3, 114:7, 114:25, 115:21, 116:2, 118:6, 118:7, 118:16, 128:10, 132:1, 140:6, 140:19, 140:20, 141:6, 143:2, 143:12, 154:23, 163:6
DR [328] - 1:3, 1:14, 3:3, 3:4, 3:25, 4:6, 4:7, 4:11, 4:13, 4:21, 7:12, 7:16, 7:22, 10:5, 10:10, 10:12, 10:19, 10:23, 15:20, 16:20, 16:22, 16:23, 18:21, 21:25, 22:14, 24:16, 24:21, 24:22, 25:12, 25:15, 25:16, 26:5, 26:6, 26:12, 27:20, 28:2, 28:14, 28:16, 31:18, 31:22, 31:25, 32:9, 32:14, 32:25, 33:7, 35:12, 35:20, 35:21, 36:4, 38:6, 38:12, 39:4, 39:5, 39:14, 40:3, 40:5, 40:11, 43:7, 43:20, 43:23, 44:2, 44:5, 44:7, 44:18, 44:25, 45:6, 45:7, 45:10, 45:11, 45:17, 46:15, 47:9, 48:2, 48:7, 48:11, 48:12,

48:17, 48:20, 49:2, 49:3, 52:9, 54:14, 54:24, 55:2, 55:16, 56:14, 58:6, 58:8, 58:15, 61:4, 62:10, 62:17, 63:1, 63:11, 65:15, 65:16, 65:22, 66:1, 70:13, 71:19, 72:3, 72:9, 72:12, 72:15, 75:19, 75:22, 75:23, 76:22, 77:14, 77:22, 78:7, 78:9, 78:11, 78:22, 79:1, 79:7, 79:10, 79:11, 80:9, 80:10, 80:16, 80:24, 85:9, 86:13, 86:16, 86:20, 87:1, 87:2, 87:6, 87:12, 87:17, 87:23, 88:3, 88:8, 88:11, 89:7, 89:10, 89:13, 89:17, 89:22, 90:2, 90:7, 90:12, 90:19, 90:23, 91:5, 91:9, 91:16, 91:20, 92:2, 92:7, 92:11, 92:16, 92:19, 93:6, 93:8, 93:11, 94:18, 96:7, 96:20, 96:23, 97:5, 98:7, 99:17, 100:4, 100:5, 102:1, 102:3, 102:23, 103:3, 103:4, 103:10, 104:5, 104:7, 104:10, 105:8, 105:10, 105:11, 105:14, 105:15, 105:16, 105:25, 106:7, 106:10, 106:23, 107:13, 107:14, 107:25, 108:8, 108:15, 108:21, 109:2, 109:6, 109:9, 109:11, 109:13, 110:9, 110:12, 110:13, 110:16, 111:12, 111:13, 112:9, 112:13, 112:21, 113:3, 113:7, 113:8, 113:14, 114:11, 114:13, 114:15, 114:17, 114:18, 114:19, 115:5, 116:2, 116:5, 116:7, 116:8, 116:9, 117:1, 119:4, 119:9, 119:10, 119:11, 120:7, 121:12, 121:15, 123:12,

123:16, 123:20, 124:19, 125:21, 126:1, 126:9, 126:11, 126:12, 126:22, 127:3, 127:24, 127:25, 128:9, 128:13, 129:17, 129:19, 129:23, 129:24, 130:3, 130:5, 132:25, 133:3, 133:5, 133:10, 134:8, 134:10, 134:13, 134:14, 135:17, 135:20, 136:2, 136:4, 136:20, 137:1, 137:8, 137:12, 137:17, 137:21, 137:22, 141:22, 142:16, 143:20, 143:22, 143:24, 144:25, 145:5, 145:6, 145:15, 145:18, 146:2, 146:8, 149:11, 149:24, 151:8, 151:25, 152:14, 152:20, 153:19, 153:24, 154:3, 154:8, 155:9, 155:11, 155:14, 156:17, 157:3, 157:16, 159:7, 159:9, 159:20, 160:8, 160:14, 161:4, 161:7, 161:18, 162:13, 162:14, 162:16, 162:22, 163:2, 163:4, 163:10, 164:6, 164:10, 164:15, 164:17, 165:3, 165:5, 165:6, 165:8
DRAFT [1] - 146:18
DRAW [2] - 50:9, 154:6
DRILLED [1] - 17:21
DRUG [2] - 31:24, 74:15
DRUGS [3] - 57:9, 57:12, 57:18
DSM [8] - 13:4, 15:11, 15:12, 15:17, 17:10, 17:25, 21:6, 60:18
DSM5 [1] - 61:24
DUE [5] - 6:19, 39:8, 39:9, 41:13, 62:23
DURATION [2] -

62:14, 74:11
DURING [2] - 92:18, 117:5
DUTIES [3] - 112:16, 112:18, 131:20
DUTY [1] - 6:15
DX [1] - 119:1
DX12 [1] - 29:3
DX2 [1] - 27:23
DX28 [1] - 38:1
DX3 [11] - 96:9, 96:14, 99:18, 104:8, 105:10, 106:6, 107:4, 118:24, 118:25, 119:2, 119:6
DX35 [2] - 38:24, 70:12
DX57 [2] - 7:11, 7:15
DX7 [4] - 29:8, 30:1, 30:14, 30:22

E

E-MAIL [4] - 3:14, 27:5, 147:15, 162:4
E-MAILED [1] - 161:13
EACH [25] - 47:22, 48:14, 51:7, 53:24, 63:18, 66:24, 83:12, 83:13, 84:8, 84:22, 93:12, 95:19, 95:20, 96:24, 104:16, 104:18, 104:19, 107:9, 120:23, 124:20, 132:4, 144:11, 150:3
EAGLE [1] - 140:22
EARLIER [24] - 7:10, 22:5, 31:24, 35:5, 35:7, 46:22, 53:10, 64:5, 71:20, 73:20, 77:5, 77:8, 86:3, 93:19, 110:19, 111:13, 112:5, 117:8, 117:22, 119:13, 120:19, 120:20, 143:2, 161:2
EARLY [1] - 78:1
EASIER [5] - 12:18, 73:10, 85:4, 162:24
EASILY [2] - 71:23, 161:1
EASTERN [1] - 1:2
EASY [2] - 6:23, 146:6
EDGE [1] - 65:2
EDIT [1] - 36:16
EDUCATION [1] - 5:5
EDUCATIONAL [3] - 4:23, 72:24, 81:21
EFFECT [5] - 3:16,

14:21, 23:24, 32:8, 122:17
EFFECTED [2] - 15:1, 15:5
EFFECTING [2] - 20:17, 72:6
EFFECTIVE [3] - 23:11, 23:17, 23:21
EFFECTS [6] - 12:21, 20:13, 23:7, 38:21, 77:14, 131:22
EFFICIENTLY [1] - 64:25
EFFORT [2] - 38:20, 49:25
EIGHT [8] - 84:11, 84:21, 99:8, 101:14, 101:15, 102:10, 107:21, 108:4
EIGHT-HOUR [1] - 84:11
EIGHTH [1] - 107:18
EITHER [5] - 3:22, 63:20, 72:23, 144:22, 151:4
ELAPSE [1] - 94:7
ELAPSED [1] - 94:3
ELECTRONIC [6] - 13:11, 14:2, 17:8, 36:14, 53:4, 53:8
ELECTRONICALLY [1] - 147:14
ELECTRONICS [1] - 107:2
ELEMENT [2] - 134:1, 134:2
ELEVATED [1] - 67:4
ELIMINATE [1] - 148:6
ELSE [7] - 17:12, 29:18, 30:12, 42:18, 79:6, 103:12, 143:23
ELUDED [1] - 72:22
EMOTIONAL [1] - 31:12
EMPLOYED [2] - 5:18, 96:21
EMPLOYMENTS [1] - 5:19
ENCOUNTER [3] - 36:5, 36:11, 94:23
ENCOURAGE [1] - 65:7
END [37] - 5:5, 17:23, 36:8, 86:4, 93:23, 94:5, 94:6, 94:10, 96:23, 96:24, 97:10, 97:13, 97:15, 97:20, 98:3, 98:6, 98:11, 99:3, 100:10, 100:12, 100:14,

100:17, 101:21,
101:23, 106:1,
108:1, 108:2, 108:6,
108:12, 108:18,
109:5, 128:15,
135:24, 141:2,
144:13, 144:14,
145:3
ENDED [1] - 94:12
ENERGY [2] - 65:1,
77:12
ENJOYABLE [1] -
40:22
ENJOYMENT [1] -
40:21
ENOUGH [8] - 13:15,
18:12, 35:16, 42:10,
48:23, 141:17,
141:23, 144:15
ENSUING [1] - 104:20
ENSURE [3] - 81:19,
104:20, 133:19
ENTER [1] - 48:18
ENTERED [1] - 28:7
ENTERPRISES [1] -
159:24
ENTIRE [4] - 44:17,
113:13, 153:18,
159:24
ENTIRETY [1] -
119:14
ENTITIES [1] - 10:2
ENTITLED [2] - 62:1,
164:22
ENVISIONING [2] -
150:18, 150:21
EPISODES [1] - 31:2
EPISODIC [1] - 32:2
EQUAL [2] - 6:20,
17:14
EQUITIES [1] - 157:11
EQUITY [1] - 131:10
ERROR [2] - 36:17,
130:16
ESPECIALLY [4] -
47:19, 53:13, 77:24,
114:2
ESQUIRE [1] - 2:2
ESSENTIAL [2] - 62:9,
62:11
ESSENTIALLY [5] -
19:6, 19:12, 23:25,
127:10, 132:20
ESTIMATE [3] - 105:2,
111:4, 128:18
ESTIMATED [2] -
128:21, 129:1
EUROPEAN [4] - 63:7,
63:9, 63:12, 63:17
EVAL [1] - 49:22
EVALUATE [3] - 8:12,
25:3, 46:15
EVALUATED [3] -
8:19, 8:21, 49:11
EVALUATING [1] -
25:8
EVALUATION [7] -
13:19, 17:21, 41:25,
42:1, 52:24, 66:5,
69:10
EVALUATIONS [5] -
6:2, 6:3, 14:25,
46:19, 49:8
EVEN [28] - 15:1,
15:13, 21:20, 22:20,
25:7, 26:10, 37:18,
42:18, 57:19, 63:20,
70:18, 77:1, 103:20,
132:21, 137:25,
138:11, 138:15,
139:3, 139:4, 139:8,
139:11, 140:4,
143:13, 143:14,
144:13, 152:19,
160:23, 160:25
EVENLY [3] - 105:20,
122:15, 142:1
EVENT [2] - 11:6,
62:16
EVENTS [1] - 62:13
EVER [12] - 11:25,
40:14, 45:18, 46:15,
46:17, 50:17, 50:21,
50:25, 109:13,
130:12, 130:22,
131:21
EVERY [16] - 8:14,
8:22, 9:11, 13:24,
13:25, 17:8, 23:10,
23:16, 23:22, 31:24,
38:19, 59:15, 59:22,
60:7, 63:15
EVERYBODY [3] -
8:9, 57:9, 144:2
EVERYONE [13] -
29:13, 32:21, 35:18,
93:6, 96:13, 103:12,
104:12, 104:23,
131:9, 139:24,
152:23, 162:19,
164:12
EVERYTHING [2] -
146:16, 161:19
EVIDENCE [22] - 6:21,
7:19, 16:5, 28:7,
30:10, 31:16, 34:14,
49:1, 58:4, 65:21,
86:19, 86:23, 87:9,
87:20, 88:6, 90:15,
91:1, 91:12, 91:23,
92:14, 154:3, 154:16
EVIDENTIARY [3] -
145:4, 153:18, 154:7
EVOLUTIONARY [1] -
11:4
EXACTLY [4] - 8:9,
18:7, 56:21, 151:19
EXAM [90] - 15:22,
27:10, 27:17, 28:4,
29:21, 30:7, 34:11,
49:25, 68:7, 70:3,
81:18, 81:19, 83:12,
83:13, 84:3, 84:6,
84:11, 84:13, 84:18,
85:14, 85:20, 85:22,
85:25, 86:1, 86:13,
86:16, 87:2, 87:13,
87:24, 90:8, 90:19,
91:5, 91:16, 92:2,
92:7, 94:8, 94:9,
94:21, 94:22, 96:16,
99:15, 99:22, 100:4,
102:2, 104:5,
104:11, 105:15,
106:2, 106:5, 106:8,
106:13, 106:15,
107:8, 107:24,
108:6, 108:9,
108:12, 108:14,
108:18, 108:20,
109:1, 109:5,
111:23, 115:7,
115:12, 115:25,
116:16, 116:19,
120:23, 121:6,
126:20, 127:4,
127:6, 127:18,
129:6, 131:5,
131:11, 133:18,
134:20, 134:23,
135:11, 141:2,
143:4, 143:11,
144:5, 144:15,
156:20, 161:2
EXAMINATION [37] -
1:6, 4:19, 9:9, 45:9,
80:22, 82:3, 82:13,
83:1, 83:2, 97:7,
109:4, 109:10,
110:11, 111:21,
112:1, 112:2,
112:18, 112:20,
113:1, 114:1, 115:8,
115:9, 116:12,
117:5, 117:24,
120:3, 126:4,
126:16, 126:25,
127:13, 128:6,
129:22, 130:1,
134:12, 134:14,
134:21, 138:25
EXAMINATIONS [2] -
6:17, 110:21
EXAMINE [3] - 94:21,
112:19, 144:19
EXAMINEE [34] - 82:7,
85:12, 86:10, 89:2,
93:16, 93:20, 93:22,
93:24, 93:25, 94:2,
94:4, 94:6, 94:13,
94:22, 94:24, 95:7,
95:8, 95:9, 97:18,
102:11, 108:5,
115:24, 116:11,
117:7, 121:14,
122:18, 123:23,
127:17, 129:3,
129:25, 130:17,
134:19, 135:1,
135:11
EXAMINEE'S [3] -
88:11, 92:18, 133:22
EXAMINEES [12] -
82:23, 83:3, 83:11,
83:22, 84:12, 84:23,
95:18, 102:13,
102:16, 117:4,
117:6, 122:16
EXAMINERS [2] - 4:5,
80:8
EXAMPLE [10] - 8:8,
14:24, 20:5, 102:9,
114:4, 116:16,
133:18, 133:23,
133:24, 147:7
EXAMS [10] - 6:3,
33:11, 68:5, 111:11,
128:20, 140:24,
141:9, 156:17,
156:18, 160:17
EXCERPT [2] - 61:24,
61:25
EXCESSIVE [3] -
62:12, 64:23, 65:5
EXCHANGE [1] -
148:3
EXCHANGED [1] -
145:10
EXCUSE [2] - 35:11,
52:21
EXCUSED [2] - 79:12,
135:21
EXECUTIVE [3] -
61:19, 73:8, 73:9
EXERCISE [1] -
151:18
EXHIBIT [50] - 7:11,
7:18, 16:16, 27:23,
28:9, 29:3, 29:8,
40:1, 48:25, 65:20,
86:7, 86:18, 86:22,
87:4, 87:8, 87:15,
87:19, 88:1, 88:5,
90:10, 90:14, 90:17,
90:25, 91:3, 91:7,
91:11, 91:18, 91:22,
92:13, 96:14, 97:3,
99:13, 101:25,
104:3, 105:9,
108:19, 114:10,
127:2, 127:4,
127:22, 132:1,
132:7, 147:15,
147:16, 147:17,
148:12, 158:14,
158:15, 158:23,
161:9
EXHIBITS [7] - 147:3,
147:6, 147:15,
147:25, 161:10,
161:19, 165:9
EXPECT [2] - 102:8,
163:9
EXPECTATION [1] -
62:13
EXPERIENCE [8] -
11:1, 11:22, 18:9,
42:19, 55:7, 63:8,
86:11, 92:19
EXPERIENCED [1] -
109:18
EXPERIENCES [3] -
21:10, 42:18, 72:7
EXPERIENCING [1] -
8:13
EXPERIMENTAL [14] -
120:24, 121:6,
121:19, 121:24,
122:1, 122:4,
122:14, 122:17,
122:22, 139:9,
139:11, 139:16,
140:3, 143:14
EXPERT [5] - 10:6,
10:15, 43:4, 46:2,
145:21
EXPERT'S [1] - 146:6
EXPERTISE [2] - 48:6,
131:5
EXPERTS [1] - 145:18
EXPIRED [3] - 94:13,
118:22, 144:14
EXPLAIN [7] - 19:12,
66:18, 85:7, 85:15,
88:23, 94:18, 142:19
EXPLAINING [2] -
64:6, 93:11
EXPLAINS [1] - 18:7
EXPLANATION [1] -
20:16

EXPLANATORY [1] - 130:23
EXPLICIT [1] - 25:7
EXPLICITLY [1] - 37:7
EXPLODES [1] - 3:18
EXPLORATORY [1] - 113:1
EXPOSURE [1] - 82:24
EXPRESS [1] - 64:2
EXPUNGE [2] - 130:12, 130:14
EXPUNGED [1] - 130:20
EXPUNGEMENT [9] - 154:19, 155:21, 156:5, 156:16, 157:4, 157:18, 158:3, 158:5
EXTENDED [2] - 27:13, 56:16
EXTENT [3] - 10:1, 31:5, 53:17
EXTERNAL [2] - 18:5, 42:1
EXTRA [13] - 21:13, 21:18, 27:10, 28:3, 44:25, 77:12, 118:2, 126:15, 143:8, 143:11, 143:25, 144:12, 154:5
EXTRAORDINARY [1] - 21:19

F

F90.9 [1] - 17:16
FACE [1] - 67:14
FACT [12] - 149:25, 150:20, 150:25, 151:9, 151:11, 151:12, 151:15, 151:17, 151:23, 151:24, 153:4
FACTOR [1] - 159:23
FACTORS [8] - 57:8, 59:2, 116:14, 128:23, 131:7, 133:20, 157:10
FACTS [2] - 149:17, 158:7
FACULTY [2] - 5:20, 82:20
FAIR [7] - 81:19, 112:21, 135:5, 135:7, 136:14, 138:3, 163:25
FAIRLY [1] - 23:13
FAIRNESS [1] - 132:25

FAKING [1] - 70:7
FALL [4] - 76:4, 76:7, 114:23, 161:3
FAMILIAR [18] - 7:22, 8:15, 8:25, 9:13, 9:16, 9:25, 47:4, 47:9, 47:15, 51:2, 52:7, 75:23, 82:3, 82:4, 82:7, 111:12, 111:16, 131:1
FAMILY [4] - 5:24, 9:11, 42:2, 42:4
FAR [6] - 27:18, 45:15, 45:16, 46:11, 106:14, 139:15
FAR-FETCHED [1] - 139:15
FARFETCHED [1] - 143:16
FASTER [2] - 57:18, 57:21
FAT [1] - 57:11
FAULT [1] - 162:9
FAVOR [1] - 155:9
FDA [2] - 56:11, 59:5
FEAR [1] - 18:16
FEATURE [1] - 62:11
FEATURES [2] - 62:5, 62:9
FEBRUARY [18] - 30:1, 36:23, 36:25, 37:3, 37:5, 38:25, 90:7, 90:8, 96:5, 96:11, 96:15, 97:7, 99:18, 104:8, 107:23, 120:3, 128:10
FED [1] - 117:15
FEDERAL [1] - 161:6
FEDERATION [1] - 47:5
FEEDBACK [2] - 138:16, 138:17
FEEL [12] - 11:13, 26:1, 26:17, 39:11, 71:3, 74:25, 97:18, 115:24, 143:14, 153:11, 153:12, 162:16
FEELING [2] - 65:2, 71:23
FEELINGS [1] - 40:23
FEELS [5] - 19:4, 33:14, 38:17, 40:19, 132:15
FELLOWSHIP [1] - 5:3
FELT [3] - 38:16, 83:18, 143:1
FETCHED [1] - 139:15

FEW [6] - 5:16, 5:19, 11:9, 37:19, 52:1, 79:1
FIELDS [1] - 93:18
FIFTH [1] - 107:18
FIGGITY [1] - 29:23
FIGURE [3] - 3:19, 160:20, 161:17
FIGURED [1] - 137:25
FILE [7] - 36:20, 36:25, 43:18, 147:13, 148:8, 149:9, 161:15
FILED [2] - 39:7, 96:10
FILING [1] - 39:8
FILL [2] - 14:4, 54:10
FILLED [2] - 105:5, 105:18
FINAL [11] - 50:11, 123:23, 123:24, 124:1, 124:7, 124:17, 125:7, 125:12, 125:17, 150:2, 157:19
FINALIZED [1] - 142:22
FIND [6] - 18:4, 64:13, 147:19, 155:8, 155:14, 157:15
FINDINGS [14] - 66:18, 149:17, 149:25, 150:20, 150:25, 151:9, 151:11, 151:12, 151:15, 151:17, 151:23, 151:24, 153:4
FINE [5] - 38:4, 62:21, 90:2, 90:3, 156:1
FINISH [3] - 83:23, 134:22, 138:16
FINISHED [3] - 83:3, 153:1, 160:22
FINISHING [1] - 82:16
FIRST [46] - 13:18, 16:1, 21:1, 23:6, 23:8, 26:22, 32:23, 33:3, 36:1, 38:9, 39:13, 40:13, 40:14, 60:1, 76:13, 79:1, 83:10, 85:4, 85:6, 85:9, 88:22, 97:14, 106:7, 113:17, 118:18, 118:20, 140:8, 140:10, 141:12, 141:19, 141:21, 142:23, 146:24, 149:9, 149:10, 149:11, 149:16, 150:4,

150:22, 151:4, 152:9, 152:10, 153:17, 153:25, 155:4
FIRST-LINE [1] - 23:6
FIRSTHAND [1] - 55:10
FITNESS [2] - 6:2, 6:15
FIVE [12] - 8:2, 79:24, 79:25, 98:19, 101:2, 102:9, 125:9, 132:21, 135:1, 135:6, 135:13, 135:14
FIVE-MINUTE [1] - 79:24
FLAG [3] - 142:8, 142:10, 142:13
FLAGGED [1] - 142:13
FLOW [1] - 109:20
FLUID [1] - 22:5
FLYERS [1] - 163:16
FOCUS [9] - 18:24, 19:5, 24:7, 32:22, 54:11, 74:11, 99:20, 143:17, 157:25
FOCUSED [7] - 28:8, 73:21, 73:24, 82:22, 83:5, 141:4, 151:19
FOCUSING [2] - 26:15, 41:14
FOLLOW [5] - 129:2, 133:2, 133:5, 133:10, 134:9
FOLLOW-UP [3] - 129:2, 133:2, 133:5
FOLLOWING [1] - 153:5
FOOTER [1] - 24:14
FOR [326] - 1:2, 2:4, 3:23, 4:16, 5:22, 5:23, 5:24, 5:25, 6:5, 6:15, 7:23, 8:8, 8:16, 8:19, 8:21, 8:23, 9:1, 9:14, 9:22, 9:23, 10:3, 11:25, 12:4, 12:18, 13:3, 13:12, 13:19, 14:15, 14:19, 15:21, 15:22, 15:23, 15:25, 16:1, 16:2, 16:3, 16:5, 16:12, 16:18, 17:6, 17:16, 18:24, 20:1, 20:2, 20:15, 21:13, 21:17, 22:15, 23:6, 23:11, 23:14, 23:20, 24:6, 24:7, 24:8, 24:9, 25:8, 26:2, 26:21, 26:25, 27:4, 27:21,

28:3, 28:22, 29:17, 30:7, 30:17, 31:7, 31:11, 31:12, 31:22, 32:2, 34:1, 34:13, 34:21, 35:1, 35:16, 36:7, 36:24, 39:7, 40:25, 41:3, 41:21, 42:5, 42:9, 43:7, 45:6, 45:22, 47:20, 47:23, 47:25, 48:12, 48:15, 49:12, 49:20, 49:22, 49:23, 49:25, 50:19, 51:3, 51:7, 51:10, 52:22, 53:9, 53:10, 53:14, 53:24, 54:9, 54:16, 55:1, 55:16, 55:17, 56:15, 57:14, 57:15, 57:17, 58:11, 58:23, 59:18, 59:25, 60:1, 60:24, 61:16, 62:7, 62:10, 62:12, 63:5, 64:6, 64:10, 64:20, 65:12, 66:9, 67:9, 68:7, 68:16, 68:17, 68:20, 69:6, 69:9, 69:18, 70:1, 73:4, 74:12, 75:19, 76:17, 78:23, 79:11, 80:2, 80:19, 81:7, 81:24, 82:2, 82:14, 82:23, 83:7, 84:1, 84:10, 86:13, 87:1, 87:12, 87:23, 89:23, 90:2, 90:7, 90:18, 91:4, 91:15, 92:1, 92:5, 92:6, 95:17, 95:18, 96:5, 96:14, 96:24, 98:6, 98:14, 99:6, 99:9, 99:10, 99:15, 100:3, 101:4, 101:8, 101:12, 101:15, 101:17, 102:1, 102:9, 102:13, 103:19, 103:20, 104:4, 104:19, 105:8, 105:13, 105:14, 106:9, 106:15, 107:12, 107:14, 107:23, 108:9, 108:13, 108:19, 108:25, 109:10, 109:17, 110:3, 110:4, 111:3, 111:9, 111:13, 111:25, 112:4, 112:16, 113:20, 114:3, 114:11, 115:25, 116:16, 116:23, 117:9, 117:23, 117:25,

118:18, 118:25,
119:4, 119:12,
120:3, 120:21,
120:23, 121:1,
123:1, 124:3, 124:6,
124:14, 125:6,
125:23, 126:15,
126:18, 126:23,
127:8, 127:16,
127:19, 128:9,
128:10, 129:17,
129:24, 130:6,
131:9, 133:18,
133:23, 135:1,
135:13, 135:14,
135:20, 136:7,
136:9, 137:7,
137:15, 138:9,
138:10, 138:22,
139:5, 140:12,
140:14, 145:4,
145:7, 146:14,
147:3, 147:7, 147:9,
148:2, 148:16,
148:20, 148:22,
149:2, 149:4,
149:18, 149:24,
150:3, 151:3, 151:8,
151:18, 152:2,
152:6, 152:13,
152:22, 153:5,
153:7, 154:2, 154:4,
154:13, 154:16,
155:14, 155:16,
155:21, 156:17,
157:13, 157:15,
157:17, 157:22,
158:8, 158:14,
159:13, 159:16,
160:10, 161:9,
162:22, 162:25,
163:1, 164:1, 164:4
FORCED [3] - 99:24,
100:6, 102:4
FOREGOING [1] -
164:20
FOREIGN [2] - 110:25,
140:21
FORENSIC [8] - 5:3,
5:14, 6:6, 6:7, 7:7,
9:5, 9:9, 41:25
FORGET [2] - 140:20,
145:21
FORM [9] - 13:7,
13:20, 19:19, 126:7,
129:3, 129:9, 156:6,
157:18, 162:3
FORMAL [1] - 26:4
FORMAT [1] - 114:4
FORMATTING [1] -
28:22
FORMS [3] - 13:7,
89:11, 129:7
FORMULATIONS [1] -
56:15
FORTH [5] - 8:1,
146:5, 149:21,
152:16, 157:11
FORWARD [3] -
47:19, 122:25, 150:8
FOUNDATIONS [1] -
76:6
FOUR [16] - 16:20,
83:13, 83:17, 83:22,
98:13, 98:14,
100:23, 101:4,
102:9, 114:23,
114:24, 150:3,
152:6, 154:23,
155:8, 162:17
FOURTH [3] - 64:15,
83:3, 107:18
FRAME [1] - 154:16
FRAMEWORK [2] -
152:13, 152:16
FREE [2] - 13:9,
103:25
FREQUENCY [1] -
62:14
FREQUENT [1] -
163:16
FREQUENTLY [1] -
63:8
FROM [94] - 3:10,
3:14, 3:19, 3:24,
3:25, 4:24, 8:17,
9:19, 10:23, 11:4,
11:7, 11:15, 11:22,
11:23, 12:5, 14:12,
20:25, 21:22, 24:14,
25:6, 26:16, 27:5,
27:12, 28:11, 28:24,
28:25, 29:4, 29:11,
30:1, 30:15, 30:23,
31:3, 31:18, 32:20,
34:11, 38:2, 39:1,
39:21, 39:24, 40:2,
43:10, 43:13, 43:15,
43:18, 43:20, 43:24,
44:12, 44:18, 44:24,
47:10, 53:3, 53:4,
53:7, 53:11, 60:16,
61:24, 61:25, 70:25,
71:12, 71:20, 72:23,
79:6, 82:20, 82:24,
86:16, 87:24, 94:2,
94:25, 95:14,
104:18, 106:2,
117:8, 117:14,
128:13, 131:4,
138:20, 140:4,
140:5, 140:15,
140:19, 140:25,
143:2, 146:4, 146:6,
149:16, 149:20,
150:4, 152:17,
160:1, 163:6,
164:14, 164:21
FSMB [1] - 47:4
FSMB'S [1] - 47:10
FULL [7] - 5:22, 17:20,
95:12, 136:14,
154:7, 161:19,
163:24
FULL-TIME [1] - 5:22
FULLY [2] - 139:2,
152:15
FUNCTION [11] - 16:8,
41:25, 61:19, 73:8,
73:9, 75:13, 126:3,
126:16, 126:18,
126:24, 127:17
FUNCTIONAL [14] -
11:14, 19:1, 20:23,
21:16, 22:10, 22:22,
26:13, 26:20, 27:1,
32:15, 39:23, 41:5,
42:11, 64:17
FUNCTIONING [8] -
20:6, 33:8, 33:25,
38:12, 39:5, 40:12,
62:24, 73:4
FUNCTIONS [2] -
34:8, 144:8
FUNDAMENTAL [1] -
14:23
FURTHER [22] -
13:14, 14:2, 30:11,
45:3, 78:11, 116:24,
128:2, 129:14,
130:3, 133:11,
134:3, 134:12,
135:17, 136:3,
136:9, 136:11,
155:23, 156:4,
156:15, 157:6,
157:19, 164:8
FUTURE [6] - 128:22,
129:10, 154:19,
155:12, 157:17,
158:9

G

GAD [1] - 13:20
GAD7 [1] - 13:20
GAP [1] - 59:21
GATHERED [2] -
88:14, 92:21
GAVE [6] - 67:4,
69:15, 125:17,
139:19, 140:23,
156:9
GENERAL [14] - 5:14,
15:9, 16:15, 23:12,
42:12, 43:1, 85:19,
85:25, 102:14,
131:3, 132:6,
141:13, 153:23,
157:7
GENERALIZED [15] -
8:8, 11:10, 13:3,
20:4, 33:1, 62:2,
62:11, 62:20, 62:22,
63:8, 63:17, 64:18,
65:6, 65:7, 65:12
GENERALLY [12] -
12:21, 14:22, 15:7,
20:1, 47:11, 47:15,
73:15, 77:7, 85:9,
88:23, 98:24, 157:9
GENEROUSLY [1] -
23:13
GET [33] - 18:19,
24:18, 28:12, 68:7,
71:16, 85:2, 88:20,
93:3, 104:24, 107:7,
109:20, 128:11,
139:13, 140:15,
142:24, 142:25,
143:5, 146:15,
146:19, 147:22,
147:24, 149:15,
149:21, 150:23,
152:7, 152:8,
152:24, 153:14,
156:10, 157:14,
161:20, 163:25
GETS [3] - 150:1,
150:2, 151:18
GETTING [3] - 106:18,
129:25, 135:5
GI [1] - 31:4
GIVE [40] - 13:23,
14:23, 29:13, 32:17,
43:3, 43:5, 48:9,
59:4, 59:5, 66:25,
77:11, 104:12,
105:5, 109:23,
111:1, 111:4,
112:12, 112:24,
116:11, 122:7,
123:1, 130:8, 133:1,
135:14, 138:4,
138:16, 139:10,
139:11, 144:6,
144:12, 146:19,
149:22, 151:5,
152:23, 153:13,
154:5, 154:6,
154:21, 155:16,
156:22
GIVEN [29] - 46:20,
48:23, 49:5, 50:14,
52:19, 58:1, 58:17,
58:19, 58:20, 59:18,
83:24, 84:8, 95:19,
116:11, 116:12,
118:1, 118:2,
119:17, 121:5,
121:10, 126:2,
126:14, 127:5,
129:8, 139:1,
139:21, 144:3,
148:11
GIVES [2] - 21:11,
149:19
GIVING [6] - 46:2,
67:15, 126:13,
136:18, 149:13,
157:12
GLIGOR [2] - 1:18,
164:25
GLITCH [1] - 130:19
GO [99] - 25:14, 25:17,
25:18, 25:19, 26:21,
26:22, 27:3, 28:23,
29:8, 29:9, 29:14,
29:25, 30:14, 30:22,
32:22, 36:1, 36:7,
36:8, 36:17, 36:19,
37:10, 38:3, 38:9,
39:1, 40:3, 40:8,
48:10, 49:16, 52:7,
53:10, 54:2, 54:8,
54:12, 54:24, 55:13,
56:23, 57:8, 76:8,
76:13, 77:3, 88:21,
93:1, 93:14, 96:4,
96:11, 98:5, 98:23,
99:4, 99:8, 99:17,
99:18, 101:10,
101:14, 104:24,
105:13, 106:22,
107:1, 107:3, 110:9,
113:3, 113:6,
114:15, 116:21,
116:22, 116:24,
119:7, 119:25,
123:8, 125:14,
134:22, 137:7,
140:4, 140:5,
140:17, 140:18,
140:19, 140:25,
141:2, 141:10,
142:15, 142:23,
142:24, 143:2,
143:10, 144:7,
146:13, 146:20,
149:10, 152:4,

152:10, 153:16,
156:3, 161:24,
163:11, 164:12
GOES [5] - 48:9,
66:24, 140:19,
141:3, 152:9
GOING [78] - 3:6,
3:15, 16:16, 18:24,
25:12, 25:13, 33:3,
34:23, 34:24, 39:15,
47:19, 48:23, 54:1,
54:4, 54:5, 67:21,
69:1, 82:11, 102:17,
102:19, 104:13,
109:21, 112:6,
112:24, 113:4,
118:16, 130:8,
140:3, 140:11,
140:13, 141:4,
141:6, 143:1, 144:5,
144:23, 145:13,
146:10, 146:13,
147:5, 149:4, 149:6,
149:7, 149:8,
149:10, 149:12,
150:4, 150:22,
150:23, 151:3,
151:5, 152:25,
153:1, 153:3,
153:13, 153:17,
154:1, 154:9,
154:11, 154:21,
156:1, 156:2,
156:14, 157:1,
157:13, 157:14,
157:19, 158:8,
158:9, 159:11,
160:4, 162:8,
162:10, 163:7,
163:8, 163:13,
163:20
GONE [1] - 120:11
GOOD [24] - 3:2, 3:3,
3:4, 4:7, 4:8, 4:11,
4:21, 15:17, 20:5,
29:10, 35:16, 45:11,
48:8, 61:1, 74:24,
80:24, 80:25,
102:20, 110:13,
148:24, 160:21,
161:14, 162:11
GORY [1] - 20:25
GOT [12] - 3:13, 5:1,
35:5, 48:22, 53:3,
53:4, 90:1, 95:5,
95:7, 95:25, 119:1,
163:24
GOTTEN [2] - 17:24,
37:23
GRADE [4] - 74:7,

76:7, 76:10, 76:15
GRADED [1] - 121:7
GRADES [3] - 73:25,
76:24, 77:4
GRADUATE [1] -
82:14
GRADUATED [1] -
4:24
GRADUATES [1] -
110:25
GRAY [1] - 56:2
GREAT [2] - 148:20,
164:3
GREATLY [1] - 137:2
GROUP [3] - 51:15,
69:16, 69:17
GROUPS [2] - 63:19,
69:14
GROWING [1] - 74:1
GUARANTEE [1] -
128:22
GUESS [8] - 5:5,
34:13, 79:6, 86:12,
96:25, 112:14,
121:25, 135:7
GUESSED [1] -
120:11
GUESSING [8] - 97:5,
97:9, 97:13, 99:24,
100:6, 100:10,
102:4, 122:21
GUIDANCE [2] -
146:20, 153:14
GUILT [1] - 40:23

H

HABITS [1] - 78:4
HACKMAN [4] - 24:21,
25:12, 25:15, 26:5
HAD [39] - 17:8, 22:8,
26:19, 37:23, 46:7,
49:19, 50:23, 50:24,
69:19, 78:16, 83:17,
94:6, 94:13, 102:19,
105:5, 107:19,
108:5, 116:17,
122:24, 125:12,
134:11, 136:8,
136:10, 136:14,
136:22, 140:22,
141:25, 143:8,
143:20, 146:11,
146:16, 158:13,
158:23, 160:16,
162:18, 163:22
HALF [5] - 6:10, 7:2,
68:21, 151:6, 160:3
HAMPTON [1] - 1:15
HAND [2] - 4:12, 80:15

HANDLE [1] - 110:2
HAPPEN [5] - 73:1,
74:20, 146:10,
157:18, 163:13
HAPPENED [2] - 3:19,
148:11
HAPPENS [2] - 36:14,
72:22
HARD [7] - 34:13,
102:19, 111:3,
149:1, 159:21,
164:1, 164:4
HARDSHIP [1] -
159:23
HARM [1] - 12:24
HAS [50] - 10:25,
11:13, 13:10, 13:14,
19:9, 19:19, 20:18,
22:9, 23:7, 23:8,
23:16, 23:25, 24:24,
25:1, 25:2, 29:13,
31:25, 32:8, 32:13,
33:12, 37:7, 37:8,
39:6, 44:22, 47:22,
48:14, 58:1, 60:23,
61:1, 63:15, 63:17,
70:6, 72:15, 72:19,
74:1, 74:9, 75:12,
84:19, 84:21, 85:4,
93:21, 96:8, 130:16,
130:20, 130:23,
142:10, 142:12,
145:17, 152:20
HATS [1] - 146:9
HAVE [253] - 3:5, 3:7,
3:23, 5:9, 5:11, 5:19,
5:21, 5:22, 6:1, 6:4,
8:19, 8:21, 9:23,
9:25, 10:2, 10:14,
11:3, 11:11, 11:19,
12:3, 12:21, 13:6,
14:2, 14:4, 14:15,
14:16, 14:18, 14:23,
15:13, 15:15, 17:7,
17:20, 17:21, 17:24,
18:11, 18:14, 20:3,
20:6, 23:10, 23:22,
23:23, 24:17, 26:10,
27:22, 28:7, 31:16,
33:22, 34:3, 34:17,
35:12, 35:24, 37:22,
40:14, 40:16, 41:19,
42:1, 42:10, 42:15,
43:4, 44:11, 45:3,
45:17, 45:20, 45:22,
45:23, 46:3, 46:7,
46:17, 47:15, 48:22,
49:8, 49:19, 50:10,
50:17, 50:18, 50:19,
50:21, 50:23, 50:25,

51:2, 51:8, 52:19,
52:20, 52:22, 52:24,
53:2, 53:6, 53:25,
56:6, 56:8, 56:18,
57:10, 57:19, 57:21,
60:4, 60:21, 62:7,
63:19, 63:22, 63:23,
64:1, 67:7, 67:17,
68:8, 69:12, 70:1,
71:11, 72:2, 72:9,
72:11, 72:20, 72:22,
72:23, 73:3, 74:8,
74:10, 74:22, 78:11,
79:15, 79:18, 79:19,
79:21, 81:4, 81:6,
81:9, 81:22, 82:8,
83:3, 83:24, 84:23,
85:21, 86:3, 88:9,
89:2, 89:10, 96:4,
96:13, 97:4, 98:15,
98:20, 98:25, 99:5,
99:9, 99:14, 100:17,
100:25, 101:4,
101:8, 101:12,
101:16, 103:11,
103:16, 103:17,
104:3, 105:7,
106:14, 107:14,
107:25, 109:7,
109:13, 109:15,
109:16, 109:24,
111:2, 112:15,
113:2, 113:4,
114:11, 120:10,
121:8, 121:17,
124:4, 124:6,
124:23, 128:2,
128:5, 128:19,
129:4, 129:7,
129:14, 129:17,
129:19, 130:5,
130:9, 130:18,
131:10, 131:20,
131:21, 132:1,
134:6, 134:8,
134:24, 136:2,
136:23, 137:4,
137:9, 137:14,
141:6, 141:17,
141:23, 142:9,
142:12, 142:13,
143:5, 143:15,
143:16, 143:17,
143:23, 144:5,
144:18, 144:20,
145:3, 145:23,
146:12, 146:18,
146:25, 147:2,
147:3, 147:10,
147:17, 148:2,
149:8, 149:10,

149:18, 149:24,
151:9, 151:22,
152:16, 152:17,
153:12, 153:19,
154:23, 155:1,
155:20, 155:22,
155:24, 155:25,
156:4, 156:15,
157:9, 157:11,
158:1, 158:2,
158:24, 159:25,
160:19, 162:16
HAVING [12] - 41:16,
74:4, 82:23, 89:7,
105:19, 129:10,
131:8, 133:23,
148:25, 161:24,
164:1
HE [63] - 19:4, 19:14,
19:18, 19:19, 19:21,
21:10, 22:8, 22:9,
25:25, 27:10, 29:22,
31:23, 33:10, 33:11,
33:12, 33:13, 33:14,
33:18, 33:21, 33:22,
34:9, 35:5, 38:14,
38:15, 38:16, 38:17,
38:19, 39:6, 39:8,
39:10, 39:17, 40:13,
40:17, 40:25, 41:9,
41:14, 41:16, 47:8,
48:2, 48:3, 55:17,
58:10, 96:21, 97:6,
112:25, 113:13,
136:21, 137:7,
142:18, 143:25,
149:12, 152:15,
154:4, 156:17,
156:19
HE'S [1] - 38:16
HEAD [5] - 16:23,
28:17, 56:21, 103:5,
121:9
HEADACHES [1] -
77:19
HEADERS [1] - 93:13
HEALTH [13] - 5:24,
13:25, 25:3, 25:8,
28:11, 28:25, 29:4,
31:13, 39:1, 43:11,
43:15, 64:10, 74:19
HEALTHCARE [3] -
9:7, 11:24
HEALTHY [2] -
149:19, 161:15
HEAR [3] - 10:12,
136:16, 137:5
HEARD [2] - 121:17,
152:23
HEARING [5] - 44:8,

159:3, 163:7, 163:8,
163:19
HEARINGS [2] -
45:24, 46:13
HEART [1] - 32:6
HEIGHTENED [1] -
40:17
HELD [1] - 81:9
HELLO [3] - 4:22,
80:10, 80:11
HELP [13] - 12:9,
12:23, 109:20,
117:16, 133:16,
141:1, 143:9,
143:13, 146:6,
146:15, 151:20,
152:23, 158:25
HELPFUL [6] - 18:5,
122:7, 123:1, 124:3,
124:14, 124:18
HELPS [3] - 32:3,
77:5, 133:19
HER [14] - 24:25, 25:4,
25:5, 25:6, 36:12,
41:2, 43:18, 70:4,
70:9, 110:4, 112:19,
136:13, 140:20,
145:20
HERE [96] - 17:1,
17:11, 19:12, 24:22,
26:10, 27:6, 27:23,
28:12, 29:12, 30:7,
30:24, 31:19, 32:24,
36:4, 48:8, 48:9,
52:18, 52:22, 54:19,
54:21, 55:1, 55:3,
55:18, 56:17, 58:17,
59:9, 61:23, 62:1,
63:4, 66:9, 66:14,
67:22, 67:24, 68:19,
68:23, 68:24, 69:2,
70:2, 71:22, 71:25,
76:3, 78:6, 86:7,
88:8, 88:11, 90:5,
92:19, 94:17, 97:20,
100:20, 101:7,
101:11, 102:21,
104:10, 106:21,
108:3, 108:17,
113:9, 113:14,
114:20, 115:1,
115:15, 115:22,
118:7, 119:2, 119:4,
119:6, 119:12,
119:24, 120:2,
120:6, 120:20,
124:13, 125:20,
126:23, 127:22,
130:9, 139:1, 149:6,
149:11, 149:14,
150:9, 150:23,
151:13, 152:10,
152:11, 154:12,
156:8, 157:5,
157:22, 159:6,
159:13, 159:23,
160:15, 162:24
HEY [2] - 14:1, 14:6
HIGH [1] - 42:20
HIGHER [6] - 57:19,
76:25, 77:4, 83:24,
114:24, 128:25
HIGHEST [4] - 34:10,
56:19, 56:22, 107:20
HIGHLIGHT [3] - 62:8,
71:22, 113:19
HIGHLIGHTED [5] -
62:8, 63:5, 113:22,
114:20, 115:1
HIGHLIGHTING [1] -
148:17
HIGHLY [1] - 129:9
HIM [14] - 10:14,
19:10, 21:11, 31:13,
31:25, 79:22,
103:12, 103:15,
108:9, 108:16,
108:22, 109:3,
112:24, 152:17
HIMSELF [2] - 31:2,
58:11
HIS [46] - 10:18, 16:20,
18:22, 18:23, 18:25,
19:5, 19:8, 19:10,
19:15, 19:16, 21:16,
25:9, 26:3, 26:14,
27:21, 28:16, 32:15,
33:8, 33:18, 34:10,
35:5, 35:8, 38:15,
38:16, 38:17, 38:22,
39:6, 39:9, 39:11,
40:12, 40:18, 40:20,
41:4, 43:10, 48:5,
96:21, 103:4,
104:11, 112:14,
112:16, 112:18,
141:22, 153:20,
154:4
HISTORY [30] - 19:9,
26:9, 30:4, 30:24,
33:4, 33:7, 38:10,
38:11, 39:14, 40:9,
40:10, 49:20, 52:4,
52:12, 52:15, 53:1,
53:2, 53:23, 53:24,
54:1, 54:3, 54:10,
55:19, 60:5, 60:10,
60:13, 60:19, 60:20,
70:22
HIT [2] - 142:10, 143:2
HMM [1] - 118:17
HOLBROOK [8] -
32:20, 32:25, 36:10,
38:3, 38:6, 39:21,
39:22, 70:25
HOLD [6] - 25:16,
58:8, 106:17,
118:25, 155:17,
156:1
HOLDOVER [1] - 53:7
HOME [3] - 34:4,
64:25, 134:22
HONESTLY [3] - 53:6,
154:12, 163:10
HONOR [70] - 3:24,
4:1, 4:4, 4:8, 10:5,
35:14, 45:4, 45:7,
47:24, 48:17, 65:16,
78:8, 78:12, 78:15,
79:9, 79:10, 79:16,
80:7, 80:11, 86:20,
102:17, 103:23,
109:8, 109:11,
110:7, 112:6,
112:13, 116:1,
121:11, 122:9,
122:12, 123:7,
128:2, 129:20,
130:4, 132:10,
132:20, 133:6,
134:4, 134:10,
135:18, 135:22,
135:25, 136:5,
137:1, 137:6,
137:12, 137:19,
138:5, 139:17,
140:7, 141:18,
142:7, 142:20,
143:10, 143:24,
144:11, 144:21,
144:25, 145:6,
146:2, 150:17,
152:3, 159:1,
160:14, 161:11,
162:6, 162:11,
164:7, 164:15
HONORABLE [1] -
1:11
HOPEFULLY [1] -
164:14
HOPELESSNESS [1] -
40:23
HORMONAL [1] - 22:6
HOSPITAL [5] - 7:8,
54:21, 55:2, 55:5,
55:9
HOURLY [9] - 14:11,
14:12, 84:9, 84:11,
84:23, 95:19, 96:24
HOURS [3] - 84:9,
94:8, 94:9
HOUSE [4] - 29:12,
30:2, 30:15, 43:13
HOW [64] - 6:21, 16:6,
18:7, 19:9, 20:16,
21:4, 21:11, 32:14,
32:15, 41:4, 42:15,
42:17, 42:19, 44:15,
45:11, 45:20, 49:8,
51:23, 51:24, 59:9,
59:12, 59:19, 60:1,
68:4, 72:6, 81:4,
81:6, 84:6, 84:18,
85:12, 94:5, 95:22,
95:24, 98:6, 110:13,
110:24, 113:3,
117:12, 117:22,
125:6, 125:11,
125:22, 125:23,
127:4, 132:18,
133:15, 139:9,
140:23, 140:24,
142:19, 143:9,
144:8, 146:11,
148:11, 154:1,
158:4, 159:9,
160:15, 160:20,
162:20
HOWEVER [3] -
99:23, 153:13, 160:4
HUE [1] - 42:23
HUGE [2] - 33:17,
77:17
HURRY [2] - 160:23,
160:25
HYPERACTIVITY [1] -
69:7
**HYPERACTIVITY/
IMPULSIVITY** [2] -
66:22, 67:8
HYPERTHYROIDISM
[1] - 54:1
HYPOTHETICALLY
[1] - 60:21
ICD-10 [1] - 17:14
IDEAS [1] - 35:1
IDENTIFIED [2] -
99:14, 104:4
IDENTIFY [1] - 89:6
IDENTIFYING [1] -
147:10
IF [240] - 3:18, 11:7,
11:17, 12:10, 12:13,
13:14, 14:18, 16:10,
16:19, 17:14, 17:16,
18:1, 18:21, 20:3,
21:24, 23:20, 23:24,
24:17, 25:13, 26:8,
26:10, 26:21, 27:5,
28:11, 28:12, 30:11,
30:22, 31:7, 32:24,
33:4, 34:9, 34:16,
34:17, 35:25, 36:4,
36:17, 37:11, 37:16,
37:24, 38:3, 39:13,
40:3, 40:8, 47:7,
49:19, 52:6, 53:25,
54:3, 54:7, 54:9,
54:18, 55:8, 55:18,
55:24, 57:1, 59:22,
59:25, 60:4, 61:11,
61:21, 62:8, 66:12,
67:21, 70:12, 70:16,
71:16, 71:17, 71:22,
72:15, 72:19, 72:23,
73:10, 74:3, 74:6,
74:25, 76:12, 76:23,
77:24, 78:1, 78:20,
79:14, 85:2, 85:4,
85:7, 85:23, 87:11,
87:22, 90:17, 91:3,
91:25, 93:3, 93:14,
93:20, 94:16, 95:5,
95:6, 95:11, 95:24,
96:9, 96:12, 96:14,
98:19, 98:23, 99:4,
99:8, 99:17, 99:18,
100:2, 100:19,
100:23, 101:2,
101:6, 101:10,
101:14, 101:18,
101:25, 102:19,
103:17, 103:18,
103:20, 104:3,
104:9, 104:11,
104:14, 105:1,
105:13, 106:1,
106:6, 106:12,
106:21, 107:1,
107:3, 107:11,
107:23, 108:3,
108:7, 108:13,
108:19, 108:25,
109:14, 109:17,

110:3, 112:5,
112:25, 113:19,
114:25, 115:2,
115:6, 115:21,
116:5, 116:22,
116:25, 118:5,
118:6, 118:7, 119:6,
119:24, 120:5,
122:11, 123:14,
124:5, 126:22,
127:22, 127:25,
128:10, 128:13,
128:19, 129:2,
135:1, 135:11,
136:8, 136:10,
136:17, 136:19,
136:22, 136:23,
137:5, 137:8,
139:13, 140:2,
140:19, 141:4,
141:6, 141:9, 142:3,
142:12, 142:13,
142:17, 143:8,
144:19, 145:11,
146:24, 147:6,
147:8, 147:20,
147:22, 148:2,
148:12, 148:15,
148:21, 152:7,
152:9, 153:6, 153:8,
154:2, 154:23,
155:5, 155:7,
155:14, 155:22,
155:24, 155:25,
156:2, 156:3,
156:11, 156:15,
157:3, 157:14,
158:24, 160:6,
160:9, 160:23,
160:25, 161:21,
162:1, 162:4, 162:8,
162:9
IGNORANCE [1] -
145:7
IGNORE [1] - 68:8
IGNORED [1] - 142:5
ILLNESS [23] - 6:9,
11:20, 12:4, 14:20,
15:19, 16:2, 20:22,
21:5, 21:7, 26:9,
30:4, 30:24, 33:5,
33:7, 38:11, 39:3,
39:14, 40:9, 40:10,
63:16, 63:22, 64:2,
70:22
ILLNESSES [3] - 13:5,
52:4, 63:22
IMAGINE [1] - 46:14
IMMEDIATE [1] -
23:23
IMMEDIATELY [2] -
14:6, 144:10
IMPACT [7] - 16:7,
18:8, 19:24, 20:20,
41:4, 62:16, 64:13
IMPACTED [1] - 19:10
IMPACTS [1] - 21:11
IMPAIR [1] - 65:5
IMPAIRED [1] - 26:18
IMPAIRMENT [12] -
8:17, 16:11, 16:13,
20:2, 20:6, 22:10,
26:12, 33:9, 39:24,
62:23, 65:4, 153:20
IMPAIRMENTS [4] -
16:21, 27:1, 61:19,
72:16
IMPAIRS [1] - 64:23
IMPLICATION [1] -
153:9
IMPORTANT [8] -
13:10, 18:18, 20:20,
41:3, 62:24, 150:7,
156:24
IMPORTANTLY [3] -
12:20, 16:8, 65:4
IMPRESSION [3] -
100:13, 100:15,
112:14
IMPRESSIONS [1] -
69:4
IMPROVED [1] - 74:11
IMPROVEMENT [2] -
26:19, 74:9
IMPROVES [1] -
133:24
IN [397] - 1:1, 4:2,
4:10, 4:25, 5:1, 5:2,
5:4, 5:8, 5:9, 5:15,
5:20, 5:23, 6:23, 7:9,
8:3, 8:11, 8:16, 8:22,
9:5, 10:6, 10:8, 11:6,
11:18, 11:22, 12:9,
12:12, 12:15, 12:19,
13:6, 13:15, 13:18,
13:25, 14:14, 15:4,
15:6, 15:10, 15:12,
15:14, 15:17, 15:22,
15:25, 16:5, 16:7,
16:19, 16:24, 17:9,
17:25, 18:1, 18:16,
19:9, 19:11, 19:19,
19:24, 20:2, 20:8,
20:10, 20:12, 20:23,
21:5, 21:7, 21:25,
22:10, 22:12, 23:11,
23:12, 23:24, 24:22,
25:5, 25:12, 25:24,
26:25, 27:6, 27:21,
27:22, 27:23, 27:24,
28:17, 28:24, 29:18,
29:20, 29:25, 30:3,
30:12, 30:14, 30:16,
30:18, 30:21, 30:22,
31:9, 31:14, 31:22,
32:22, 33:5, 34:2,
34:8, 34:18, 35:21,
36:14, 36:21, 36:25,
37:9, 38:7, 39:2,
39:8, 39:13, 39:18,
39:21, 40:6, 40:15,
40:20, 40:21, 40:25,
41:2, 41:4, 41:5,
41:20, 42:4, 42:19,
42:20, 44:3, 44:16,
44:20, 44:22, 44:25,
45:13, 45:18, 45:21,
45:22, 45:23, 45:24,
46:2, 46:4, 46:8,
46:9, 46:11, 46:22,
47:16, 48:3, 49:8,
49:14, 49:22, 50:10,
51:4, 51:13, 51:24,
53:1, 53:9, 53:15,
54:3, 54:20, 55:2,
55:19, 56:2, 58:5,
60:18, 61:14, 62:9,
62:23, 63:12, 63:16,
63:24, 64:3, 64:10,
65:7, 65:13, 65:17,
65:25, 66:23, 67:7,
69:12, 69:13, 70:4,
70:5, 70:6, 70:9,
70:17, 70:18, 70:19,
71:7, 71:13, 72:7,
72:11, 73:17, 74:7,
74:9, 74:13, 74:18,
74:21, 75:6, 75:7,
75:9, 76:7, 76:16,
76:21, 77:17, 77:18,
77:24, 79:1, 79:7,
80:13, 81:4, 81:10,
81:12, 81:16, 81:22,
81:23, 82:1, 82:15,
82:22, 83:2, 83:6,
83:9, 83:10, 83:20,
85:16, 85:17, 86:4,
86:6, 86:15, 88:17,
88:20, 88:23, 89:1,
89:11, 92:23, 93:3,
93:8, 94:11, 94:19,
94:23, 95:1, 95:16,
96:2, 96:7, 96:8,
96:14, 97:4, 97:7,
97:12, 97:14, 97:19,
97:23, 97:24, 99:2,
100:16, 101:20,
102:7, 102:14,
102:23, 103:5,
104:7, 105:2, 105:4,
105:5, 105:18,
106:14, 106:20,
107:9, 108:4,
108:23, 109:20,
109:24, 110:22,
111:23, 112:3,
112:14, 112:23,
113:20, 113:24,
114:2, 114:4,
114:19, 115:24,
116:15, 116:24,
117:15, 117:17,
117:18, 119:7,
119:13, 119:17,
120:5, 120:6, 121:9,
122:20, 123:10,
123:24, 124:9,
126:13, 126:20,
126:24, 127:7,
127:9, 127:11,
128:24, 130:15,
131:20, 132:13,
132:16, 132:19,
132:25, 133:21,
134:19, 135:8,
135:20, 136:2,
136:8, 136:10,
136:13, 136:14,
136:20, 136:23,
137:14, 137:22,
137:25, 139:4,
139:5, 140:4,
140:10, 140:11,
141:15, 142:4,
142:17, 142:20,
143:3, 143:6, 144:9,
145:19, 145:20,
145:23, 146:16,
147:4, 148:13,
148:19, 148:23,
149:7, 149:11,
149:21, 149:25,
151:2, 151:6,
151:16, 151:17,
151:19, 152:2,
152:18, 152:19,
152:25, 153:1,
153:3, 153:12,
153:23, 153:25,
154:16, 154:17,
155:1, 155:9,
155:13, 155:15,
155:24, 156:6,
156:12, 156:22,
157:2, 157:6,
157:12, 157:18,
157:24, 158:2,
158:6, 158:9,
158:20, 159:10,
159:13, 160:1,
162:3, 162:7,
162:17, 162:18,
163:16, 163:24,
164:21
INATTENTION [3] -
66:22, 67:8, 69:18
INCLUDE [5] - 54:3,
116:14, 148:13,
157:22, 158:21
INCLUDED [1] -
130:23
INCLUDES [2] - 6:18,
52:4
INCLUDING [4] -
54:10, 101:20,
128:23, 153:18
INCORPORATE [2] -
50:12, 122:14
INCORRECT [3] -
95:7, 138:20, 138:21
INCORRECTNESS [1]
- 138:19
INCREASE [3] - 11:5,
19:5, 77:19
INCREASED [1] - 32:6
INCREASES [2] -
75:6, 77:6
INDEPENDENT [3] -
6:3, 6:16, 65:9
INDEPENDENTLY [3]
- 54:2, 54:13, 95:2
INDICATE [10] - 16:13,
21:2, 58:20, 60:13,
71:7, 71:8, 73:3,
73:7, 116:17, 158:20
INDICATED [10] -
67:7, 72:11, 76:15,
77:5, 77:8, 115:15,
120:15, 120:17,
121:21, 122:2
INDICATES [6] -
33:18, 37:2, 56:10,
70:6, 86:4, 94:12
INDICATING [6] -
25:4, 66:21, 67:5,
94:14, 105:17,
122:24
INDICATION [3] -
72:3, 116:11, 135:15
INDICATIVE [2] -
14:17, 22:9
INDICATOR [4] -
58:25, 59:1, 61:1,
61:2
INDIVIDUAL [6] -
18:18, 89:1, 95:18,
95:22, 95:24, 127:10
INDIVIDUAL'S [2] -
64:24, 73:8
INDIVIDUALLY [1] -
95:2
INDIVIDUALS [9] -

9:19, 10:1, 62:19,
 62:21, 63:7, 63:9,
 63:12, 65:6, 131:10
INEXPENSIVE ^[1] -
 23:14
INFER ^[1] - 57:6
INFORMAL ^[1] - 43:4
INFORMATION ^[37] -
 18:4, 18:12, 19:12,
 26:12, 27:23, 32:17,
 37:17, 37:23, 37:25,
 42:2, 47:14, 70:2,
 70:10, 85:12, 85:19,
 85:20, 85:25, 93:2,
 93:12, 94:19,
 113:25, 118:1,
 120:14, 121:5,
 121:20, 121:22,
 121:24, 122:6,
 123:1, 123:11,
 135:3, 139:21,
 147:10, 156:8,
 158:18, 164:2
INFORMED ^[1] - 83:16
INITIATION ^[1] - 78:2
INJUNCTION ^[14] -
 43:21, 43:24, 44:8,
 70:5, 155:10,
 155:16, 157:7,
 157:8, 157:9,
 157:12, 157:20,
 157:21, 158:5, 163:7
INJUNCTIVE ^[1] - 39:7
INJURY ^[3] - 5:15,
 14:24, 15:1
INPATIENTS ^[1] - 7:7
INSIDE ^[2] - 55:9
INSOMNIA ^[1] - 77:22
INSTANCE ^[7] - 51:10,
 53:25, 57:17, 69:18,
 108:23, 123:10,
 136:9
INSTANCES ^[1] -
 102:7
INSTEAD ^[4] - 34:12,
 89:7, 149:5, 149:14
INSTRUCTIONS ^[1] -
 31:18
INTAKE ^[1] - 28:12
INTENDING ^[1] -
 81:20
INTENSITY ^[1] - 62:14
INTENTIONALLY ^[1] -
 121:2
INTERACT ^[1] - 44:16
INTERACTED ^[2] -
 47:14, 82:8
INTEREST ^[3] - 150:7,
 157:10
INTERESTED ^[1] -
 136:23
INTERFACES ^[1] - 6:9
INTERFERE ^[1] - 78:2
INTERNAL ^[1] - 18:9
INTERNATIONAL ^[2] -
 110:24, 111:2
INTERNIST ^[1] - 55:17
INTERNISTS ^[1] - 9:11
INTERPLAY ^[1] -
 44:16
INTERPRET ^[1] -
 50:12
INTERPRETATION ^[1]
 - 67:15
INTERPRETING ^[2] -
 10:15, 146:5
INTERRUPT ^[2] -
 35:12, 126:6
INTERSPERSED ^[1] -
 122:15
INTO ^[48] - 7:18,
 13:24, 14:4, 14:6,
 17:8, 31:16, 39:15,
 44:15, 48:18, 49:1,
 50:12, 57:9, 60:9,
 65:17, 65:21, 66:24,
 67:19, 77:3, 84:7,
 84:16, 84:25, 86:19,
 86:22, 87:5, 87:8,
 87:16, 87:19, 88:1,
 88:5, 89:23, 90:11,
 90:14, 90:21, 90:25,
 91:8, 91:11, 91:19,
 91:22, 92:9, 92:13,
 104:13, 104:15,
 141:20, 144:5,
 144:7, 145:9,
 154:13, 163:8
INTRODUCED ^[1] -
 31:16
INTRODUCING ^[1] -
 133:21
INTRUSIVE ^[1] - 40:22
INVEST ^[2] - 121:2,
 139:5
INVESTMENT ^[1] -
 139:7
INVOLVED ^[2] -
 111:23, 131:21
IRREGULAR ^[1] -
 53:14
IS ^[606] - 3:6, 3:13,
 3:17, 4:13, 4:23,
 5:16, 6:6, 6:7, 6:10,
 6:12, 6:13, 7:5, 7:12,
 7:14, 7:18, 7:25, 8:3,
 8:7, 10:23, 10:25,
 11:1, 11:2, 11:8,
 11:9, 11:10, 11:12,
 12:10, 12:15, 12:23,
 12:24, 13:7, 13:8,
 13:10, 13:16, 13:18,
 13:20, 13:21, 14:9,
 14:22, 14:25, 15:3,
 15:4, 15:5, 15:10,
 15:12, 15:16, 15:17,
 15:24, 16:17, 17:3,
 17:10, 17:11, 17:17,
 17:18, 17:25, 18:4,
 18:11, 18:18, 18:19,
 19:10, 19:11, 19:12,
 19:14, 19:18, 19:21,
 19:22, 20:11, 20:12,
 20:13, 20:21, 20:22,
 20:24, 21:4, 21:15,
 21:19, 21:21, 22:2,
 22:9, 22:11, 22:19,
 22:20, 22:21, 23:3,
 23:4, 23:5, 23:6,
 23:12, 23:13, 23:19,
 23:23, 24:2, 24:3,
 24:4, 24:24, 25:5,
 25:7, 25:8, 25:12,
 25:20, 25:21, 25:24,
 25:25, 26:3, 26:11,
 26:20, 26:22, 26:24,
 26:25, 27:12, 28:10,
 29:3, 29:11, 29:18,
 29:22, 29:23, 30:1,
 30:3, 30:7, 30:11,
 30:13, 30:14, 30:17,
 30:20, 31:9, 31:11,
 31:13, 31:17, 31:19,
 31:21, 32:1, 32:2,
 32:19, 32:21, 33:11,
 33:13, 33:15, 33:17,
 34:5, 34:10, 34:13,
 34:14, 34:20, 35:2,
 35:5, 35:6, 35:16,
 36:5, 36:11, 36:15,
 36:17, 37:9, 37:10,
 37:11, 37:19, 37:21,
 37:22, 38:2, 38:14,
 38:20, 38:24, 39:8,
 39:15, 39:17, 39:21,
 40:1, 40:13, 40:14,
 40:20, 40:25, 41:1,
 41:9, 41:12, 41:14,
 41:16, 41:18, 42:5,
 42:23, 44:18, 44:19,
 44:24, 47:25, 48:8,
 48:23, 48:25, 51:11,
 51:12, 51:20, 53:6,
 53:22, 54:6, 55:2,
 55:5, 55:17, 55:18,
 55:22, 56:3, 56:11,
 56:14, 56:17, 56:20,
 56:22, 56:24, 57:12,
 57:14, 57:24, 57:25,
 58:10, 58:18, 58:20,
 58:23, 58:25, 59:1,
 59:2, 59:5, 59:12,
 59:23, 61:2, 61:4,
 61:15, 61:24, 61:25,
 62:12, 62:15, 63:12,
 63:15, 63:16, 64:9,
 64:12, 64:14, 65:8,
 65:9, 65:20, 66:19,
 66:21, 67:3, 67:5,
 67:9, 67:13, 67:14,
 67:18, 68:9, 68:18,
 68:19, 68:20, 68:21,
 68:22, 68:24, 69:9,
 69:11, 69:19, 69:20,
 69:24, 70:7, 70:8,
 70:24, 71:6, 72:10,
 72:18, 73:9, 73:11,
 73:13, 73:23, 74:24,
 75:1, 75:3, 75:5,
 75:10, 75:20, 76:15,
 76:18, 77:8, 77:16,
 77:22, 77:25, 78:3,
 78:19, 78:25, 79:21,
 80:16, 81:1, 81:14,
 81:15, 81:19, 81:20,
 81:21, 81:23, 82:17,
 82:21, 82:22, 83:2,
 83:4, 83:7, 83:9,
 83:15, 84:6, 84:7,
 84:8, 84:9, 84:14,
 84:15, 84:18, 84:22,
 85:1, 85:7, 85:10,
 85:11, 85:15, 85:17,
 85:25, 86:2, 86:7,
 86:9, 86:12, 86:16,
 86:22, 87:1, 87:8,
 87:12, 87:19, 87:23,
 88:5, 88:14, 89:12,
 89:15, 90:1, 90:6,
 90:14, 90:18, 90:25,
 91:4, 91:11, 91:15,
 91:21, 91:22, 92:1,
 92:6, 92:13, 92:18,
 92:23, 93:3, 93:12,
 93:16, 93:18, 93:20,
 93:22, 93:23, 93:25,
 94:3, 94:7, 94:19,
 94:21, 94:22, 95:4,
 95:7, 95:14, 95:16,
 95:17, 95:19, 95:21,
 96:5, 96:10, 96:14,
 96:20, 97:8, 97:11,
 97:12, 97:14, 97:16,
 97:24, 98:14, 98:20,
 98:24, 99:5, 99:9,
 100:13, 100:20,
 100:24, 101:3,
 101:7, 101:11,
 101:15, 101:21,
 101:22, 101:25,
 102:7, 102:13,
 102:15, 102:20,
 103:17, 104:10,
 104:16, 105:14,
 106:4, 106:7,
 106:13, 106:14,
 106:16, 106:20,
 107:4, 107:11,
 107:13, 107:21,
 108:2, 108:11,
 108:13, 108:17,
 108:19, 108:23,
 108:25, 109:4,
 109:17, 109:25,
 110:2, 110:5,
 110:18, 111:17,
 111:24, 112:3,
 112:7, 112:10,
 112:19, 114:2,
 114:10, 115:2,
 115:8, 115:19,
 116:12, 117:6,
 117:9, 117:12,
 117:15, 117:19,
 117:20, 117:24,
 118:18, 118:21,
 118:22, 119:6,
 119:8, 119:9,
 119:16, 119:24,
 120:3, 120:14,
 120:23, 121:18,
 121:20, 122:14,
 122:16, 123:19,
 124:1, 124:14,
 124:19, 124:20,
 124:25, 125:23,
 126:2, 126:14,
 127:5, 127:9, 128:9,
 128:22, 128:25,
 129:25, 130:14,
 130:15, 130:22,
 131:3, 131:5, 131:8,
 131:16, 131:19,
 132:14, 133:20,
 134:1, 134:2,
 134:14, 134:17,
 134:18, 134:19,
 135:1, 135:3,
 135:11, 136:6,
 136:18, 138:5,
 138:7, 138:10,
 138:17, 138:22,
 139:16, 140:9,
 140:17, 140:18,
 140:21, 141:4,
 141:7, 141:21,
 142:5, 142:7, 144:2,
 144:3, 144:4, 144:9,
 145:2, 145:20,
 145:22, 146:6,
 146:10, 146:13,
 146:21, 146:24,
 147:6, 147:20,

147:21, 148:12,
148:16, 148:18,
149:9, 149:12,
150:10, 150:12,
151:10, 151:13,
151:14, 151:19,
152:1, 152:12,
153:6, 153:17,
154:1, 154:2, 154:3,
154:11, 154:15,
154:18, 154:24,
154:25, 155:5,
155:7, 156:5,
156:14, 156:16,
157:4, 157:5, 157:6,
157:14, 157:21,
157:23, 157:25,
158:18, 158:21,
159:9, 159:16,
159:18, 159:21,
159:23, 159:25,
160:5, 160:7,
160:16, 161:23,
161:24, 162:22,
163:12, 164:2,
164:20

ISLANDER ^[1] - 63:10

ISNT ^[42] - 46:5, 46:7,
46:23, 47:22, 48:14,
52:3, 52:23, 55:8,
56:5, 56:9, 56:11,
57:5, 60:12, 60:19,
60:20, 60:23, 61:7,
61:12, 71:6, 71:11,
72:19, 73:13, 73:23,
76:23, 111:24,
115:5, 115:24,
116:9, 116:10,
117:4, 117:10,
120:7, 120:10,
120:14, 120:22,
121:1, 121:7,
121:20, 121:23,
122:3, 122:6

ISSUE ^[5] - 113:1,
136:25, 138:1,
155:10, 158:6

ISSUES ^[8] - 103:11,
110:23, 136:12,
137:9, 153:5, 153:6,
153:9, 163:24

IT ^[445] - 3:8, 3:19, 6:8,
7:1, 7:14, 8:7, 8:22,
11:6, 11:11, 11:12,
11:14, 11:15, 11:19,
12:13, 12:19, 13:12,
13:16, 13:18, 13:22,
14:5, 14:9, 14:12,
14:13, 14:16, 14:18,
15:2, 15:12, 15:13,
15:15, 15:16, 15:18,
17:12, 17:14, 17:20,
18:23, 19:2, 19:3,
19:7, 19:9, 20:14,
21:3, 21:9, 21:12,
21:16, 21:19, 21:22,
22:17, 22:18, 22:20,
23:6, 23:7, 23:11,
23:12, 23:13, 23:16,
23:18, 23:23, 23:25,
24:23, 25:2, 25:6,
25:22, 26:14, 26:17,
27:9, 27:17, 28:1,
28:21, 29:2, 29:14,
29:16, 29:17, 29:21,
30:15, 30:16, 30:20,
31:4, 32:3, 32:8,
32:10, 32:12, 32:14,
32:17, 32:21, 33:16,
33:21, 34:10, 36:13,
36:15, 36:16, 36:17,
36:24, 37:13, 37:14,
38:19, 38:22, 39:7,
41:9, 41:10, 41:13,
41:24, 42:2, 42:23,
44:11, 44:18, 44:24,
46:3, 46:5, 46:7,
46:25, 47:8, 47:15,
47:22, 48:4, 48:14,
48:24, 50:9, 50:18,
50:19, 51:3, 51:12,
52:3, 52:12, 52:16,
52:22, 52:23, 53:1,
53:3, 53:4, 53:9,
53:13, 53:17, 53:21,
54:3, 54:5, 54:9,
54:10, 55:8, 56:1,
56:5, 56:11, 57:2,
57:5, 57:10, 57:20,
58:4, 58:6, 58:11,
58:22, 58:23, 58:25,
59:1, 59:2, 59:23,
60:12, 60:15, 60:16,
60:19, 60:20, 60:23,
61:2, 61:7, 61:11,
61:12, 61:15, 62:8,
62:21, 63:4, 63:12,
64:14, 66:6, 66:10,
66:12, 66:24, 67:13,
67:14, 69:3, 69:14,
70:9, 70:21, 71:6,
71:11, 71:23, 72:10,
72:19, 72:22, 72:23,
73:11, 73:13, 73:23,
74:4, 74:17, 74:25,
75:4, 75:6, 75:9,
75:12, 75:24, 76:18,
76:23, 77:4, 77:19,
77:24, 78:1, 78:3,
78:5, 78:20, 79:3,
82:17, 82:19, 82:21,
82:23, 84:20, 85:17,
85:20, 86:16, 89:21,
92:5, 93:3, 93:14,
94:9, 95:6, 95:13,
98:4, 98:8, 98:14,
98:22, 99:16, 99:23,
100:4, 100:9,
102:13, 103:20,
103:22, 104:13,
104:21, 105:2,
107:7, 107:21,
111:1, 111:24,
112:7, 112:10,
112:17, 113:12,
113:19, 114:7,
114:24, 114:25,
115:5, 115:8,
115:11, 115:16,
115:17, 115:24,
116:9, 116:10,
116:17, 117:4,
117:13, 117:16,
117:17, 118:21,
119:9, 119:13,
119:19, 119:20,
120:7, 120:10,
120:14, 120:22,
120:23, 121:1,
121:7, 121:8,
121:13, 121:18,
121:20, 121:24,
122:3, 122:6,
122:17, 123:16,
124:3, 124:5, 124:8,
124:14, 124:18,
124:22, 125:3,
125:6, 125:22,
126:15, 126:20,
126:21, 126:24,
127:4, 127:6,
127:10, 127:13,
127:16, 127:17,
128:8, 129:9,
129:24, 130:22,
131:8, 131:13,
132:2, 132:3, 132:4,
132:14, 132:15,
132:16, 132:19,
133:15, 133:19,
134:17, 134:19,
135:3, 136:11,
137:5, 137:7,
137:21, 137:23,
138:3, 138:4,
138:16, 138:17,
139:11, 139:14,
139:15, 139:16,
139:18, 139:19,
139:20, 139:23,
140:3, 140:4,
140:12, 140:19,
141:7, 141:9,
141:10, 141:20,
142:7, 142:10,
142:12, 142:13,
142:14, 142:21,
142:25, 143:4,
143:9, 143:10,
143:12, 143:13,
143:15, 143:16,
144:2, 144:15,
145:12, 145:19,
146:1, 146:3,
146:13, 146:14,
146:16, 146:17,
146:20, 147:4,
147:19, 147:24,
148:15, 148:20,
149:1, 149:12,
150:3, 150:10,
151:14, 151:19,
152:1, 152:22,
153:2, 153:6,
154:13, 155:7,
155:25, 156:1,
156:9, 157:2,
157:14, 157:21,
157:23, 158:6,
158:10, 158:25,
159:11, 159:23,
160:6, 160:9,
160:11, 160:16,
160:19, 161:1,
162:1, 162:3, 162:4,
162:8, 162:11,
163:21

IT' ^[1] - 148:21

IT'S ^[121] - 6:10, 6:23,
8:23, 11:3, 11:12,
12:18, 12:19, 13:9,
13:17, 13:22, 13:23,
14:10, 15:4, 15:5,
15:7, 15:13, 16:10,
17:10, 17:13, 17:18,
19:21, 20:16, 23:8,
23:10, 23:18, 23:20,
23:21, 24:5, 24:8,
24:25, 25:21, 25:23,
27:19, 31:8, 31:10,
37:12, 37:19, 37:20,
42:14, 46:3, 46:11,
48:19, 48:20, 50:8,
51:7, 51:8, 51:14,
53:1, 53:5, 53:10,
56:15, 61:11, 67:16,
67:21, 68:9, 72:8,
75:8, 77:4, 81:24,
82:15, 82:23, 84:11,
84:20, 86:1, 90:2,
90:3, 92:3, 92:21,
94:3, 98:17, 106:12,
109:23, 110:1,
111:3, 112:17,
113:4, 117:7,
118:18, 124:13,
126:22, 131:3,
131:15, 135:10,
140:21, 141:10,
142:3, 142:23,
144:3, 146:24,
147:22, 148:15,
148:18, 148:21,
149:6, 150:6,
151:18, 152:21,
152:25, 153:3,
155:13, 158:15,
158:20, 159:21,
160:2, 160:10,
160:11, 160:16,
160:24, 160:25,
161:15, 162:7,
162:24, 163:13,
163:14, 163:21

ITEM ^[14] - 89:2, 89:4,
95:3, 95:5, 95:7,
95:10, 95:15, 95:21,
96:3, 99:2, 122:14,
122:16, 125:3, 125:9

ITEMS ^[32] - 84:7,
84:8, 84:20, 84:21,
84:22, 89:1, 93:20,
94:24, 95:1, 95:3,
95:4, 95:20, 95:22,
95:25, 96:2, 97:15,
97:18, 97:21, 97:22,
97:23, 97:24, 98:2,
98:10, 101:22,
102:12, 121:19,
129:7, 129:8,
129:10, 129:13,
134:24

ITS ^[5] - 47:22, 48:14,
88:18, 92:24, 119:13

ITSELF ^[2] - 13:18,
53:12

J

J-U-R-I-C-H ^[1] - 80:21

JANUARY ^[6] - 16:19,
22:1, 22:3, 22:10,
28:10, 38:2

JOB ^[7] - 110:5,
112:16, 112:18,
120:21, 125:24,
147:13, 162:19

JOHN ^[1] - 1:11

JOINT ^[2] - 48:25,
65:20

JORDAN ^[1] - 80:10

JOURNAL ^[1] - 69:13

JR ^[2] - 1:3, 1:14

JUDGE [5] - 3:4,
126:11, 161:7,
161:25, 164:6

JULY [9] - 25:13,
29:11, 30:15,
108:20, 150:1,
150:2, 150:13,
150:14

JUMPY [1] - 29:22

JUNE [10] - 87:13,
92:2, 92:3, 92:4,
92:7, 147:12, 148:7,
149:19, 150:4,
150:13

JURICH [49] - 80:9,
80:16, 80:20, 80:24,
85:9, 87:1, 88:8,
92:16, 93:11, 94:18,
98:7, 100:4, 102:23,
103:10, 105:14,
105:25, 106:10,
107:13, 109:6,
109:13, 111:12,
112:22, 113:14,
114:11, 114:19,
115:5, 116:9, 117:1,
119:4, 120:7,
121:16, 123:16,
123:20, 124:19,
125:21, 126:1,
126:22, 127:3,
128:13, 129:24,
130:5, 133:1,
133:10, 134:14,
135:20, 137:22,
141:22, 142:16,
165:6

JURICH'S [3] -
136:20, 143:20,
143:22

JURY [1] - 145:2

JUST [143] - 3:18, 8:4,
11:12, 11:18, 14:1,
16:4, 18:10, 19:14,
19:19, 20:1, 20:8,
20:19, 23:16, 23:21,
24:15, 24:16, 26:21,
26:24, 27:6, 27:22,
29:12, 30:17, 32:8,
32:12, 34:3, 34:6,
34:12, 35:10, 35:24,
36:3, 36:7, 42:13,
43:2, 43:3, 43:5,
47:12, 47:13, 47:24,
48:4, 48:7, 53:7,
53:22, 54:9, 54:10,
54:18, 54:23, 54:24,
55:1, 58:3, 62:9,
63:23, 64:2, 64:20,
66:9, 68:16, 70:18,

71:1, 72:2, 73:10,
75:19, 78:16, 79:7,
79:8, 79:19, 79:22,
79:23, 82:10, 83:7,
85:6, 85:9, 85:15,
86:25, 89:5, 89:8,
89:18, 92:5, 93:2,
93:11, 93:15, 94:7,
95:11, 96:13, 96:18,
98:3, 101:17,
102:23, 104:15,
104:23, 104:24,
106:9, 106:17,
109:21, 110:5,
111:3, 111:4, 112:6,
113:3, 113:20,
115:21, 117:16,
118:6, 119:8,
120:20, 121:13,
124:14, 126:7,
127:23, 128:5,
129:2, 129:12,
131:4, 132:16,
133:9, 133:15,
134:9, 134:19,
137:7, 137:15,
138:9, 139:14,
141:3, 142:2, 143:3,
143:4, 143:16,
145:9, 148:21,
148:22, 153:2,
154:20, 155:18,
158:13, 158:14,
161:5, 161:10,
161:11, 161:13,
161:20, 161:22,
162:1

JUSTIFIED [1] - 127:6

JX [3] - 86:22, 87:8,
88:5

JX04 [2] - 75:15, 75:20

JX14 [5] - 85:4, 88:9,
93:1, 107:23, 116:25
JX15 [6] - 85:6, 86:7,
86:18, 88:9, 101:25,
108:7

JX16 [4] - 86:25, 87:5,
107:11, 108:13

JX17 [4] - 87:11,

87:15, 87:19, 108:19

JX18 [4] - 87:22, 88:1,
108:25, 119:24

JX19 [13] - 88:21,
90:5, 90:11, 90:14,
92:17, 94:16, 96:4,
96:7, 97:3, 97:5,
120:1, 120:3

JX20 [6] - 90:17,
90:21, 90:25, 92:17,
99:13, 100:2

JX21 [7] - 91:3, 91:8,
91:11, 92:17, 104:3,
105:13, 132:2

JX22 [5] - 91:14,
91:19, 91:21, 91:22,
92:17

JX23 [4] - 91:25, 92:9,
92:13, 92:17

JX25 [2] - 47:7, 48:18

K

KEEP [10] - 34:4,
34:23, 34:25, 67:21,
68:25, 69:1, 98:2,
102:18, 104:12,
112:10

KEEPING [2] - 10:8,
35:8

KEEPS [1] - 122:3

KENTUCKY [5] - 5:8,
5:20, 5:23, 47:1,
63:2

KEY [1] - 140:14

KEYED [2] - 65:2, 90:1

KHAN [3] - 20:25,
55:2, 55:16

KHAN'S [1] - 54:24

KIDS [1] - 77:17

KIND [21] - 12:16,
19:20, 24:24, 25:24,
29:12, 32:7, 42:5,
44:14, 66:24, 72:8,
72:22, 85:24,
119:12, 139:14,
139:20, 147:18,
148:11, 152:19,
154:9, 155:4, 159:19

KINDS [1] - 9:22

KING [1] - 43:23

KITCHENS [177] - 1:3,
1:14, 3:3, 3:4, 3:25,
7:16, 10:10, 10:12,
10:19, 16:19, 16:20,
16:22, 16:23, 24:16,
24:22, 25:16, 26:6,
27:21, 28:15, 28:16,
32:14, 32:25, 35:20,
35:21, 38:7, 39:15,
40:5, 44:19, 44:25,
45:6, 45:7, 45:10,
48:2, 48:7, 48:11,
48:17, 49:2, 54:14,
58:6, 58:8, 58:15,
65:16, 65:22, 75:19,
75:22, 78:7, 78:11,
79:7, 79:10, 86:20,
87:6, 87:17, 88:3,
89:10, 89:13, 89:17,
89:22, 90:2, 90:12,

90:23, 91:9, 91:20,
92:11, 92:19, 93:7,
93:8, 96:8, 96:20,
96:23, 97:5, 100:5,
102:3, 103:3, 103:4,
104:10, 105:8,
105:10, 105:11,
106:23, 107:14,
107:25, 108:8,
108:15, 108:21,
109:2, 109:9,
109:11, 110:10,
110:12, 112:9,
112:13, 113:3,
113:7, 113:8,
114:13, 114:15,
114:17, 114:18,
116:2, 116:6, 116:7,
116:8, 119:9,
119:10, 119:11,
121:12, 123:12,
126:9, 126:11,
126:12, 127:24,
127:25, 128:9,
129:17, 129:19,
129:23, 130:3,
133:3, 133:5, 134:8,
134:10, 134:13,
135:17, 136:2,
136:4, 137:1, 137:8,
137:12, 137:17,
137:21, 143:24,
144:25, 145:5,
145:6, 145:15,
146:2, 146:8,
149:11, 149:24,
151:8, 151:25,
152:14, 152:20,
153:19, 154:4,
154:8, 155:11,
155:14, 156:17,
157:4, 157:16,
159:7, 159:9,
159:21, 160:8,
160:14, 161:4,
161:7, 161:18,
162:13, 162:14,
162:16, 162:22,
163:2, 163:4,
163:10, 164:6,
164:10, 164:15,
164:17, 165:5, 165:8

KITCHENS'S [40] -
15:21, 18:21, 21:25,
22:14, 26:12, 28:2,
32:9, 33:7, 38:12,
39:5, 40:11, 43:7,
43:20, 43:24, 44:2,
44:5, 44:7, 79:1,
86:13, 86:16, 87:2,
87:13, 87:24, 88:12,

89:7, 90:7, 90:19,
91:5, 91:16, 92:2,
92:7, 99:17, 102:1,
104:5, 104:7,
105:15, 105:16,
106:7, 153:24, 155:9

KNEW [3] - 140:22,
163:6, 163:7

KNOW [54] - 3:17,
17:11, 20:4, 21:4,
21:8, 24:17, 25:7,
26:16, 37:7, 41:5,
42:17, 42:18, 42:21,
47:15, 47:19, 53:2,
77:1, 102:19,
103:21, 111:3,
121:3, 122:16,
125:23, 135:2,
135:3, 139:18,
140:10, 140:14,
143:5, 144:4, 144:7,
144:8, 145:11,
145:13, 145:21,
148:17, 149:11,
150:6, 153:10,
154:12, 154:20,
156:21, 158:16,
159:15, 159:21,
159:23, 160:15,
161:2, 161:22,
162:10, 162:20,
162:21, 163:8, 163:9

KNOWING [2] - 57:25,
129:10

KNOWLEDGE [6] -
83:5, 120:23,
122:22, 128:21,
128:24, 129:12

KNOWN [2] - 37:22,
144:2

KNOWS [3] - 8:9,
139:9, 139:24

KY [1] - 1:16

L

LAB [3] - 50:9, 50:10,
54:5

LACK [4] - 40:21,
64:7, 64:12, 72:23

LAG [1] - 89:8

LAID [3] - 60:17,
109:17, 150:4

LANDED [1] - 152:21

LANGUAGE [3] -
67:23, 71:12, 128:11

LARGEST [1] - 56:16

LAST [15] - 5:16, 6:10,
8:4, 15:9, 45:23,
47:16, 58:14, 74:18,

94:25, 96:23, 97:21,
99:20, 144:11,
151:22, 162:18
LASTS [1] - 14:19
LATER [9] - 25:6,
37:10, 37:21, 37:23,
41:11, 77:24, 78:1,
147:12, 163:2
LATIN [1] - 58:23
LATTER [1] - 152:2
LAW [9] - 6:19,
149:18, 150:21,
151:1, 154:15,
154:22, 157:8,
157:21
LAWSUIT [1] - 39:6
LAWYER [2] - 10:17,
146:9
LAWYERS [2] - 133:1,
163:17
LAYOUT [2] - 152:25,
153:1
LEADS [2] - 19:7,
34:11
LEARN [2] - 6:24,
37:17
LEARNED [2] -
103:13, 103:17
LEARNING [1] - 82:24
LEAST [6] - 9:23,
18:19, 47:16, 59:15,
143:4, 153:5
LEAVE [5] - 17:19,
141:10, 149:1,
158:8, 160:5
LEEWAY [4] - 48:9,
112:12, 112:25,
130:8
LEFT [18] - 35:25,
54:20, 76:11, 97:1,
100:1, 100:8, 102:6,
102:11, 104:21,
107:14, 107:20,
107:25, 108:11,
108:17, 108:23,
109:5, 118:19,
141:25
LEGAL [7] - 6:9, 6:21,
110:4, 152:13,
152:16, 153:5,
154:11
LEGALLY [3] - 156:5,
156:16, 157:5
LENGTH [4] - 60:10,
95:17, 96:3, 133:19
LENGTHY [3] - 38:24,
38:25, 60:13
LESS [4] - 8:23, 12:19,
52:1, 52:2
LET [17] - 19:23,
21:17, 24:16, 33:20,
49:10, 52:21, 57:23,
58:10, 60:21, 61:10,
74:5, 119:24,
141:12, 141:20,
149:22, 161:22,
163:5
LET'S [55] - 3:5, 20:4,
20:24, 22:24, 24:12,
27:3, 29:3, 29:8,
29:14, 29:25, 30:23,
35:17, 36:7, 36:19,
36:24, 38:1, 38:9,
38:24, 39:2, 39:20,
59:9, 60:20, 78:6,
78:8, 79:14, 85:6,
85:15, 86:25, 88:20,
88:21, 89:25, 92:5,
93:1, 94:16, 94:17,
96:4, 98:1, 98:13,
100:12, 102:21,
107:3, 116:22,
118:5, 118:24,
119:1, 119:2,
119:25, 146:9,
154:24, 157:15
LETTER [15] - 19:6,
20:25, 21:1, 21:12,
21:24, 22:14, 39:17,
39:21, 54:24, 95:8,
104:19, 105:18,
119:20, 130:24,
142:16
LETTERS [2] - 105:5,
131:2
LETTING [1] - 152:10
LEVEL [13] - 3:17,
11:20, 12:1, 12:13,
26:12, 31:2, 33:8,
38:12, 40:11, 58:2,
58:21, 128:21,
131:13
LEVELS [3] - 64:2,
73:4, 128:24
LICENSED [4] - 5:7,
5:8, 46:22, 48:3
LICENSES [1] - 5:9
LICENSING [2] - 1:6,
114:1
LICENSURE [4] -
34:11, 47:23, 48:15,
111:9
LIFE [17] - 6:12, 8:22,
14:15, 20:13, 20:23,
22:8, 27:24, 34:3,
34:5, 34:6, 44:20,
61:12, 61:17, 72:7,
139:23, 153:21,
162:17
LIFETIME [2] - 15:7,
61:15
LIKE [70] - 3:17,
10:14, 11:12, 13:1,
13:2, 14:3, 17:24,
19:16, 21:21, 23:21,
23:22, 31:4, 32:5,
39:1, 45:13, 45:17,
47:21, 48:18, 49:11,
49:24, 53:7, 59:12,
59:23, 65:17, 65:24,
68:10, 72:7, 72:18,
75:8, 76:18, 79:18,
82:18, 85:1, 95:13,
96:11, 97:2, 99:2,
104:6, 107:21,
109:25, 110:1,
115:17, 126:1,
132:13, 132:14,
132:15, 133:1,
137:18, 138:13,
139:23, 140:3,
144:19, 147:8,
149:7, 150:19,
151:23, 153:10,
153:12, 155:15,
157:8, 157:10,
157:20, 160:18,
161:21, 162:5,
163:3, 163:14
LIKELIHOOD [1] -
62:15
LIKELY [5] - 76:25,
115:2, 115:4, 115:8,
116:12
LIMIT [6] - 42:12,
83:15, 83:16, 83:18,
151:3, 159:25
LIMITATION [10] -
11:15, 20:23, 21:17,
22:22, 26:13, 26:20,
27:24, 41:5, 41:7,
42:11
LIMITATIONS [2] -
19:1, 32:15
LIMITED [4] - 16:14,
44:19, 154:3, 154:8
LIMITING [2] - 42:24,
153:10
LIMITS [1] - 153:20
LINE [10] - 23:6,
36:10, 62:19, 70:24,
71:2, 93:13, 119:7,
121:25, 125:3, 141:5
LINES [2] - 62:7,
132:12
LIST [9] - 53:6, 81:8,
112:21, 147:6,
147:16, 147:17,
158:14, 161:9
LISTED [3] - 25:20,
112:22, 132:5
LISTEN [3] - 138:23,
139:8, 139:13
LISTENED [1] - 130:9
LISTING [1] - 53:22
LISTS [3] - 16:20,
22:18, 55:19
LITERALLY [3] - 11:5,
12:3, 14:10
LITIGANT [2] - 163:12,
163:15
LITIGANTS [1] -
163:17
LITIGATION [2] - 96:8,
161:6
LITTLE [35] - 22:3,
24:15, 27:6, 28:9,
28:13, 29:13, 33:5,
38:4, 39:2, 47:12,
47:13, 54:18, 54:23,
54:24, 62:9, 70:18,
70:19, 70:20, 81:5,
85:3, 96:18, 97:20,
98:4, 102:24,
109:18, 112:25,
113:20, 115:21,
118:6, 130:8, 135:7,
143:11, 146:15,
147:4
LIVE [2] - 51:13, 146:3
LIVES [1] - 11:3
LLP [1] - 2:2
LOCATION [1] - 51:4
LOCATIONS [1] - 51:8
LOCKED [1] - 36:15
LODGE [1] - 112:7
LOG [1] - 102:23
LOGGING [1] - 123:4
LONG [13] - 14:14,
14:17, 23:14, 49:19,
81:4, 81:6, 84:6,
84:18, 89:23, 95:22,
113:5, 135:14, 140:9
LONG-TERM [2] -
14:14, 14:17
LONGER [1] - 161:1
LONGEVITY [1] - 16:2
LOOK [53] - 12:5,
13:14, 14:2, 14:6,
16:20, 17:14, 17:16,
18:1, 24:12, 24:14,
25:11, 25:13, 26:8,
28:6, 30:11, 31:7,
32:24, 33:4, 34:16,
36:4, 39:13, 42:8,
44:17, 49:23, 49:25,
94:17, 97:2, 98:1,
98:2, 98:6, 98:13,
98:19, 99:2, 100:12,
100:19, 100:23,
101:2, 101:6, 105:1,
105:25, 106:6,
106:21, 108:7,
140:12, 140:14,
146:5, 147:19,
154:13, 157:20,
160:6, 160:9
LOOKED [7] - 24:18,
47:16, 56:18, 69:12,
69:13, 100:3, 106:2
LOOKING [26] - 15:25,
16:1, 16:2, 16:3,
16:5, 16:12, 19:24,
20:1, 20:2, 20:15,
27:15, 34:16, 34:17,
35:13, 40:24, 44:12,
44:15, 68:18, 89:18,
105:14, 107:5,
107:6, 138:2,
139:12, 140:8,
142:17
LOOKS [4] - 76:18,
95:13, 98:22, 107:21
LOST [1] - 162:16
LOT [19] - 14:24,
19:23, 28:22, 33:16,
37:25, 44:11, 46:3,
46:14, 63:22, 89:8,
125:22, 138:13,
139:15, 141:8,
151:5, 157:23,
157:24, 160:1, 163:3
LOTTED [1] - 86:2
LOUD [1] - 69:6
LOUISVILLE [1] - 4:25
LOW [5] - 12:21, 23:7,
27:19, 51:15
LOW/PASS [1] - 115:3
LOWER [2] - 114:24,
128:25
LOWEST [1] - 27:18
LUNCH [2] - 79:18,
80:2
LUNCHEON [1] -
103:1
LYNN [5] - 1:18, 4:9,
80:12, 159:15,
164:25

M

M.D [1] - 5:1
MA'AM [1] - 105:11
MADE [8] - 32:13,
36:17, 42:6, 55:20,
71:7, 147:10, 154:4,
160:19
MAGIC [1] - 161:25
MAGNETIC [1] - 6:4
MAIL [4] - 3:14, 27:5,

147:15, 162:4
MAILED [1] - 161:13
MAIN [1] - 131:15
MAINTAINED [2] - 88:17, 92:23
MAJOR [3] - 27:24, 44:20, 153:21
MAJORITY [4] - 83:17, 118:21, 118:22, 144:13
MAKE [33] - 10:13, 26:24, 29:13, 32:10, 36:24, 50:1, 54:5, 77:25, 78:19, 79:20, 114:10, 130:10, 138:14, 139:6, 146:21, 146:22, 146:23, 147:2, 147:8, 147:11, 147:13, 149:12, 150:24, 151:10, 151:17, 152:14, 152:18, 152:20, 153:14, 160:13, 160:24, 163:23
MAKES [1] - 103:19
MAKING [5] - 18:10, 26:4, 31:2, 48:8, 150:8
MALPRACTICE [1] - 6:14
MANAGE [1] - 163:4
MANAGER [1] - 81:12
MANAGING [1] - 38:16
MANDATES [1] - 56:12
MANDATORY [1] - 157:9
MANNER [4] - 13:15, 21:7, 34:8, 75:9
MANNERS [1] - 64:3
MANUAL [1] - 8:2
MANUALLY [1] - 94:14
MANY [24] - 18:17, 45:20, 47:16, 47:17, 49:8, 50:20, 51:15, 51:24, 61:18, 77:3, 81:24, 110:24, 117:22, 128:23, 132:18, 138:5, 138:6, 139:9, 148:6, 151:16, 162:20
MARCH [2] - 31:17, 40:2
MARKCUS [3] - 1:3, 1:14, 16:18
MARKED [2] - 104:17, 148:17
MARKET [1] - 1:19
MASS [1] - 57:18
MASTER'S [1] - 81:22
MATERIAL [1] - 43:18
MATERIALS [2] - 116:16, 134:18
MATTER [4] - 102:14, 154:15, 156:6, 164:22
MAXIMUM [8] - 56:12, 56:14, 56:22, 56:25, 57:25, 58:19, 59:4, 117:19
MAY [48] - 1:8, 4:3, 12:1, 12:12, 12:14, 14:1, 24:14, 24:22, 26:21, 30:23, 35:23, 45:8, 54:11, 57:10, 65:5, 72:20, 73:3, 79:12, 83:11, 86:13, 86:17, 87:2, 90:19, 91:16, 95:22, 99:15, 99:22, 100:3, 102:1, 106:20, 107:5, 107:12, 108:9, 108:13, 109:16, 109:24, 112:17, 117:4, 128:24, 141:10, 150:17, 151:16, 151:17, 153:6, 155:1, 158:19, 158:21
MAYBE [18] - 13:13, 18:15, 24:15, 36:8, 37:18, 63:20, 85:7, 93:3, 94:16, 101:17, 131:10, 135:21, 139:10, 152:5, 153:15, 157:24, 163:18
NBME [2] - 88:11, 88:17
ME [77] - 3:16, 3:23, 3:24, 3:25, 11:23, 19:7, 19:23, 21:9, 22:9, 23:3, 24:16, 27:9, 27:17, 31:21, 33:20, 34:25, 35:11, 37:7, 37:14, 46:15, 46:17, 46:20, 49:10, 50:19, 52:21, 53:25, 57:23, 60:21, 61:10, 62:7, 70:10, 74:5, 102:18, 103:19, 104:21, 105:5, 106:9, 115:17, 117:23, 119:24, 125:6, 130:11, 131:24, 134:11, 137:9, 137:18, 139:19, 140:23, 140:24, 141:12, 141:20, 143:10, 143:13, 144:12, 145:12, 145:20, 146:17, 148:20, 149:22, 151:20, 152:22, 152:23, 153:15, 154:6, 154:22, 155:16, 155:17, 156:7, 156:9, 156:12, 160:12, 161:22, 162:9, 162:22, 163:5, 163:13
MEAN [16] - 18:8, 19:16, 20:3, 26:18, 44:14, 49:11, 52:25, 60:15, 69:21, 73:11, 126:18, 133:15, 139:3, 142:11, 155:15, 160:23
MEANING [3] - 102:10, 134:18, 155:8
MEANINGFUL [4] - 97:22, 98:10, 100:16, 101:21
MEANINGS [1] - 11:1
MEANS [6] - 17:19, 17:20, 21:9, 53:1, 69:16, 126:8
MEANT [1] - 41:19
MEANTIME [1] - 156:12
MEASURE [4] - 66:20, 66:23, 67:7, 81:19
MEASURED [2] - 127:9, 133:21
MEASUREMENT [2] - 81:17, 81:23
MEASURES [1] - 16:12
MECHANISM [2] - 11:4, 75:5
MEDICAID [1] - 51:16
MEDICAL [48] - 1:6, 4:5, 6:3, 6:14, 6:16, 9:6, 10:8, 11:23, 12:4, 13:6, 13:11, 14:2, 16:7, 17:8, 36:15, 37:3, 40:16, 47:5, 52:3, 52:8, 52:12, 52:14, 53:1, 53:4, 53:15, 53:23, 54:3, 55:10, 55:18, 55:25, 60:5, 71:7, 71:12, 72:24, 77:2, 80:8, 82:12, 82:14, 82:18, 82:25, 83:16, 83:17, 83:25, 110:25, 111:8, 114:1, 138:8
MEDICALIZED [1] - 12:16
MEDICATION [27] - 9:14, 12:24, 23:5, 23:6, 23:10, 24:6, 24:9, 31:21, 32:12, 32:16, 33:15, 34:7, 54:16, 57:7, 58:17, 59:11, 59:16, 59:19, 59:25, 60:6, 60:16, 60:24, 60:25, 61:8, 61:12, 71:4, 71:8
MEDICATIONS [12] - 9:1, 12:14, 12:17, 12:20, 14:18, 23:1, 24:6, 26:17, 33:21, 35:8, 49:19, 57:3
MEDICINE [7] - 5:1, 5:15, 13:1, 22:12, 32:1, 54:22, 55:6
MEET [7] - 42:9, 59:10, 60:1, 74:20, 110:22, 147:5, 148:5
MEETING [3] - 13:2, 20:8, 60:6
MEMBER [1] - 5:20
MENTAL [18] - 6:9, 8:13, 11:20, 12:4, 13:25, 14:20, 16:2, 17:3, 21:5, 25:3, 25:8, 31:13, 38:20, 41:22, 63:16, 64:2, 64:10, 153:19
MENTALLY [1] - 33:23
MENTION [1] - 84:12
MENTIONED [10] - 6:7, 7:10, 15:14, 46:22, 48:2, 51:8, 59:2, 64:5, 66:19, 133:13
MENTIONS [2] - 19:2, 19:3
MERITS [1] - 137:7
MESS [1] - 162:8
MET [3] - 46:17, 60:17, 111:2
METABOLIZE [2] - 57:17, 57:20
METABOLIZES [1] - 57:9
METHOD [1] - 130:16
MEW [143] - 2:2, 3:2, 3:12, 3:21, 3:24, 4:3, 4:4, 4:20, 7:15, 7:20, 10:5, 10:16, 10:22, 16:22, 16:25, 24:16, 24:20, 28:14, 28:18, 35:11, 35:13, 35:23, 35:24, 36:2, 45:3, 47:24, 48:5, 48:8, 48:19, 53:17, 58:3, 58:9, 58:12, 65:18, 78:14, 78:15, 79:7, 79:9, 79:15, 79:16, 79:22, 80:3, 80:6, 80:7, 80:23, 86:18, 86:24, 87:4, 87:10, 87:15, 87:21, 88:1, 88:7, 89:10, 89:15, 89:20, 89:25, 90:4, 90:10, 90:16, 90:21, 91:2, 91:7, 91:13, 91:18, 91:24, 92:9, 92:15, 93:6, 93:10, 102:17, 102:23, 103:6, 103:9, 103:15, 103:23, 104:1, 104:2, 105:8, 105:10, 105:12, 106:23, 106:25, 109:6, 110:3, 112:6, 112:19, 112:24, 114:9, 114:14, 116:1, 119:8, 121:11, 121:13, 122:9, 123:4, 126:6, 127:23, 128:4, 128:5, 128:7, 129:14, 133:8, 133:9, 133:12, 134:3, 134:6, 135:24, 135:25, 136:13, 137:4, 137:6, 144:18, 144:20, 145:1, 145:7, 145:12, 145:17, 150:12, 150:17, 150:23, 151:8, 151:23, 152:3, 152:5, 154:5, 155:14, 155:16, 158:13, 159:1, 161:8, 161:17, 161:23, 162:6, 162:10, 162:15, 163:1, 164:7, 164:11, 164:16, 164:17, 165:4, 165:7
MEWS [3] - 112:22, 145:20, 147:13
MEWS [1] - 103:17
MICROBIOLOGY [1] - 76:17
MICROSOFT [2] - 1:9, 3:15
MID [1] - 161:3
MID-FALL [1] - 161:3

MIDDLE [5] - 18:1, 27:6, 29:20, 34:18, 107:6
MIDST [1] - 39:8
MIGHT [9] - 32:15, 54:2, 109:18, 130:10, 131:12, 143:14, 145:22, 150:10, 155:6
MILD [2] - 18:13, 21:6
MILDER [1] - 75:8
MILLIGRAM [1] - 57:25
MILLIGRAMS [11] - 56:17, 56:20, 56:24, 57:24, 58:5, 58:19, 58:20, 58:22, 58:23, 59:5
MIND [14] - 79:23, 109:24, 132:16, 136:2, 136:8, 136:10, 136:13, 140:10, 152:19, 155:15, 157:3, 157:6, 158:2
MINE [2] - 12:7, 158:15
MINIMAL [1] - 97:16
MINIMIZE [1] - 159:21
MINISTERIAL [2] - 158:14, 161:8
MINORITIES [1] - 64:11
MINUS [5] - 69:20, 69:22, 69:23, 69:24
MINUTE [6] - 25:16, 26:21, 36:7, 79:24, 95:11, 106:18
MINUTES [24] - 3:8, 84:8, 84:10, 84:14, 84:16, 84:23, 84:24, 94:10, 95:20, 107:22, 108:5, 108:11, 108:17, 108:23, 109:5, 117:14, 117:21, 117:24, 118:2, 135:2, 135:6, 135:13, 135:14
MIRROR [1] - 114:3
MISCHARACTERIZE [2] - 53:18, 58:4
MISIDENTIFIED [1] - 147:7
MISSED [2] - 150:12, 155:2
MISSIE [1] - 43:23
MIXED [1] - 119:2
MIXTURE [1] - 24:5
MK12 [1] - 30:22

MK16 [1] - 30:14
MK19 [1] - 29:25
MK24 [1] - 29:9
MM [1] - 118:17
MM-HMM [1] - 118:17
MODERATE [3] - 21:6, 58:1, 58:21
MODERATELY [1] - 65:11
MODERN [1] - 76:4
MODULATING [1] - 23:5
MONTH [6] - 14:13, 60:3, 60:7, 138:9, 138:10
MONTHS [8] - 14:19, 22:2, 22:8, 37:10, 37:21, 37:23, 59:23, 59:24
MOOD [8] - 7:23, 11:1, 14:14, 15:6, 29:22, 30:9, 34:22, 35:6
MOON [1] - 11:18
MORBID [1] - 65:9
MORE [51] - 11:10, 11:12, 11:18, 12:16, 14:6, 16:8, 22:3, 25:7, 30:22, 31:14, 31:15, 38:5, 38:14, 40:11, 43:4, 45:25, 46:3, 51:2, 54:9, 59:21, 59:24, 60:22, 63:8, 63:11, 63:17, 63:19, 68:25, 70:18, 70:19, 73:21, 73:24, 79:15, 79:16, 83:12, 83:22, 86:12, 96:18, 105:20, 107:5, 115:22, 127:7, 127:11, 130:3, 131:11, 142:24, 144:20, 152:1, 153:21, 155:14, 158:22, 160:7
MORNING [10] - 3:2, 3:3, 3:4, 4:7, 4:8, 4:11, 4:21, 45:11, 80:24, 80:25
MOST [23] - 12:19, 14:22, 18:19, 21:20, 27:25, 34:13, 35:8, 41:8, 44:19, 46:3, 46:10, 59:23, 64:1, 65:10, 68:5, 76:25, 82:12, 82:25, 152:2, 152:23, 153:22, 158:22, 159:17
MOSTLY [2] - 51:11, 51:18
MOTHER [1] - 43:24

MOTION [3] - 43:21, 43:25, 145:20
MOTIVATION [1] - 40:20
MOVE [9] - 31:15, 71:17, 86:18, 87:4, 87:15, 88:1, 103:25, 140:4, 142:14
MOVES [6] - 7:15, 90:10, 90:21, 91:7, 91:18, 92:9
MOVING [1] - 122:25
MOXO [14] - 50:21, 67:22, 68:2, 68:4, 68:11, 68:22, 68:24, 69:10, 69:11, 69:14, 69:15, 69:24, 70:6
MS [150] - 3:2, 3:12, 3:21, 3:24, 4:2, 4:4, 4:20, 7:15, 7:20, 10:5, 10:16, 10:22, 16:22, 16:25, 24:16, 24:20, 28:14, 28:18, 35:11, 35:13, 35:23, 35:24, 36:2, 36:10, 45:3, 47:24, 48:5, 48:8, 48:19, 53:17, 58:3, 58:6, 58:9, 58:12, 65:18, 70:4, 70:25, 78:14, 78:15, 79:7, 79:9, 79:15, 79:16, 79:22, 80:3, 80:6, 80:7, 80:23, 86:18, 86:24, 87:4, 87:10, 87:15, 87:21, 88:1, 88:7, 89:10, 89:15, 89:20, 89:25, 90:4, 90:10, 90:16, 90:21, 91:2, 91:7, 91:13, 91:18, 91:24, 92:9, 92:15, 93:6, 93:10, 102:17, 102:23, 103:6, 103:9, 103:15, 103:16, 103:23, 104:1, 104:2, 105:8, 105:10, 105:12, 106:23, 106:25, 109:6, 110:3, 112:6, 112:19, 112:22, 112:24, 114:9, 114:14, 116:1, 119:8, 121:11, 121:13, 122:9, 123:4, 126:6, 127:23, 128:4, 128:5, 128:7, 129:14, 133:8, 133:9, 133:12, 134:3, 134:6,

135:24, 135:25, 136:13, 137:4, 137:6, 144:18, 144:20, 145:1, 145:6, 145:12, 145:17, 145:20, 147:13, 150:12, 150:17, 150:23, 151:8, 151:23, 152:3, 152:5, 154:5, 155:14, 155:16, 158:13, 159:1, 161:8, 161:17, 161:23, 162:6, 162:10, 162:15, 163:1, 164:7, 164:11, 164:16, 164:17, 165:4, 165:7
MUCH [16] - 18:24, 57:20, 69:24, 75:8, 94:6, 98:3, 113:2, 116:24, 117:12, 121:9, 122:22, 125:6, 125:12, 125:22, 144:2, 159:9
MULTIPLE [3] - 93:19, 106:12, 118:20
MURPHY [1] - 1:11
MUSCLE [2] - 57:11, 65:2
MUST [4] - 18:11, 23:24, 83:25, 117:6
MUTE [1] - 10:11
MY [74] - 3:16, 3:17, 5:1, 5:12, 6:12, 7:2, 7:9, 37:6, 46:4, 49:21, 50:12, 51:3, 53:24, 54:3, 55:16, 55:18, 56:21, 63:14, 75:20, 76:3, 79:4, 79:15, 82:20, 100:15, 103:17, 104:16, 105:13, 106:18, 107:7, 107:13, 110:18, 110:22, 113:11, 119:1, 119:6, 120:3, 121:4, 122:24, 123:17, 124:1, 124:11, 124:16, 125:6, 125:12, 125:17, 132:16, 132:24, 133:2, 134:11, 136:8, 136:13, 137:22, 139:3, 140:5, 140:20, 140:22, 141:1, 141:17, 145:7, 145:8, 147:21, 151:11,

151:17, 152:19, 154:17, 155:15, 156:11, 157:2, 157:6, 158:2, 158:25, 162:17, 163:11
MYSELF [4] - 130:8, 139:6, 139:22, 154:13

N

NAME [9] - 4:16, 23:4, 24:4, 54:19, 54:21, 80:19, 85:21, 140:20, 140:21
NARRATIVE [1] - 136:25
NARROW [1] - 109:22
NATIONAL [2] - 4:5, 80:8
NATIVE [1] - 63:10
NATURE [3] - 8:16, 53:1, 161:5
NBME [30] - 10:5, 15:22, 16:19, 71:14, 81:6, 81:7, 82:2, 82:6, 85:11, 86:9, 90:10, 90:21, 91:7, 91:18, 92:9, 92:23, 111:22, 113:10, 120:7, 122:3, 130:12, 130:20, 130:22, 131:5, 131:20, 135:25, 137:24, 139:1, 154:4, 155:11
NBME'S [3] - 78:22, 141:7, 144:6
NEARLY [1] - 72:9
NECESSARILY [14] - 12:1, 14:17, 26:18, 42:14, 52:25, 54:2, 89:17, 119:13, 121:18, 124:13, 135:4, 135:5, 135:16, 141:5
NECESSARY [3] - 17:6, 112:10, 153:6
NEED [29] - 11:5, 11:16, 14:1, 18:6, 18:9, 20:20, 21:22, 31:12, 34:7, 79:22, 126:17, 132:6, 133:14, 136:17, 145:11, 145:16, 146:25, 151:24, 153:12, 153:14, 153:15, 154:14, 155:18, 157:12,

158:10, 160:11,
160:17, 161:10,
161:11
NEEDED [5] - 23:19,
23:21, 32:3, 39:18
NEEDING [1] - 14:17
NEEDS [4] - 19:4,
34:9, 44:25, 127:15
NEGATIVE [3] - 29:17,
35:1, 40:22
NEIGHBORS [1] -
45:13
NEITHER [1] - 120:15
NERVOUS [1] - 11:13
NERVOUS/ANXIOUS
[1] - 35:2
NEURODEVELOPM
ENTAL [2] - 61:4,
61:7
NEUROLOGY [1] -
5:14
NEUROPSYCHIATRI
C [1] - 29:15
NEVER [6] - 14:16,
46:21, 59:24,
144:11, 163:11,
163:13
NEW [6] - 5:4, 5:16,
13:24, 20:8, 37:24,
133:14
NEXT [11] - 4:3, 20:24,
22:11, 24:12, 25:11,
25:14, 37:18, 85:1,
128:12, 146:10
NICE [1] - 109:20
NIGHT [1] - 149:7
NIGHT'S [1] - 162:11
NINE [4] - 13:12,
69:23, 81:7, 82:6
NINTH [1] - 107:18
NO [89] - 7:16, 10:19,
13:12, 14:10, 14:22,
17:5, 19:12, 20:3,
21:11, 22:21, 23:25,
28:5, 29:7, 30:5,
30:9, 31:11, 32:17,
38:8, 38:21, 39:25,
41:9, 45:2, 46:16,
46:18, 54:17, 58:6,
58:16, 59:21, 60:8,
60:21, 64:9, 65:18,
67:13, 67:17, 67:19,
72:16, 73:10, 78:10,
78:11, 78:15, 79:9,
79:10, 86:20, 87:6,
87:17, 88:3, 90:12,
90:23, 91:9, 91:20,
92:11, 97:8, 100:9,
104:20, 105:22,
108:11, 108:17,
108:23, 109:4,
111:15, 112:17,
117:6, 126:22,
128:2, 129:7, 130:2,
130:3, 130:21,
131:19, 133:5,
134:3, 134:18,
135:16, 135:17,
136:18, 137:6,
139:9, 140:3, 141:4,
144:25, 145:1,
145:2, 147:12,
159:1, 159:2, 161:4,
164:10, 164:11
NODDED [2] - 35:21,
93:8
NODS [1] - 103:4
NON [2] - 63:9, 159:14
NON-EUROPEAN [1] -
63:9
NONE [3] - 19:11,
74:14, 79:3
NONINSTITUTIONAL
IZED [1] - 65:10
NOR [1] - 113:25
NOREPINEPHRINE
[2] - 75:10, 75:13
NORM [1] - 37:20
NORMAL [7] - 11:2,
69:15, 69:16, 69:19,
69:20, 69:21, 69:22
NORMALCY [1] -
42:19
NORMALITY [1] -
42:19
NORMALLY [7] -
94:11, 94:12,
117:12, 149:9,
152:8, 152:11,
163:14
NORTHWEST [3] -
22:12, 54:22, 55:6
NOT [231] - 3:16, 3:24,
3:25, 6:23, 9:10,
9:16, 10:17, 11:12,
12:1, 12:12, 12:24,
13:17, 14:7, 14:17,
14:25, 15:5, 15:12,
15:13, 15:16, 15:17,
16:4, 16:10, 17:10,
17:13, 17:20, 17:21,
17:24, 18:12, 19:7,
19:21, 21:3, 21:4,
21:9, 21:16, 21:20,
21:21, 21:23, 22:9,
22:17, 22:19, 22:21,
22:23, 23:19, 23:21,
23:23, 24:10, 24:25,
25:5, 25:7, 25:23,
26:1, 26:4, 26:7,
26:11, 26:18, 26:20,
28:21, 29:2, 29:22,
29:23, 30:13, 32:11,
32:17, 33:17, 33:21,
33:22, 34:3, 34:24,
35:2, 35:7, 35:13,
37:6, 37:19, 37:20,
37:22, 38:19, 41:3,
41:10, 42:5, 42:14,
42:24, 44:16, 45:3,
45:15, 45:16, 47:11,
47:16, 49:19, 50:7,
50:13, 50:23, 51:2,
52:25, 53:10, 53:24,
54:1, 54:10, 54:11,
54:12, 56:17, 56:18,
56:21, 60:17, 64:8,
68:22, 70:10, 71:8,
71:9, 72:2, 72:9,
72:10, 72:20, 72:25,
74:20, 74:22, 77:18,
78:19, 78:20, 79:23,
83:23, 94:2, 97:8,
99:2, 100:9, 100:17,
101:22, 102:7,
102:13, 103:20,
104:13, 105:7,
105:23, 107:8,
109:7, 109:15,
109:18, 109:25,
110:2, 111:22,
116:5, 117:4,
118:25, 119:16,
120:12, 120:14,
120:17, 121:2,
121:3, 121:7,
121:17, 121:20,
122:1, 122:2,
122:14, 122:17,
124:13, 126:6,
127:13, 127:17,
128:22, 129:14,
130:10, 130:21,
131:1, 131:10,
131:19, 131:24,
132:15, 133:21,
133:22, 134:22,
134:24, 135:4,
135:16, 137:23,
138:3, 139:2,
139:14, 139:15,
139:22, 139:23,
140:4, 141:5,
141:10, 141:16,
142:2, 142:12,
143:3, 143:10,
143:12, 143:14,
144:15, 145:7,
145:8, 145:19,
145:25, 146:6,
146:24, 147:10,
148:3, 148:24,
149:6, 152:5,
152:11, 152:21,
153:1, 155:6,
155:10, 156:1,
156:9, 157:13,
158:2, 158:17,
159:11, 159:12,
161:1, 161:19,
162:8, 162:10,
162:22, 163:1,
163:14
NOTATION [1] - 31:10
NOTE [14] - 32:20,
36:4, 36:12, 37:3,
37:8, 37:11, 37:12,
37:13, 37:24, 38:2,
40:2, 53:8, 78:19,
162:3
NOTED [2] - 104:19,
116:14
NOTES [2] - 38:14,
38:19
NOTHING [7] - 26:14,
27:2, 30:20, 97:1,
99:25, 100:7, 102:6
NOTICE [1] - 144:10
NOTICEABLE [2] -
100:18, 101:23
NOTICED [2] - 35:7,
71:11
NOTION [1] - 121:9
NOW [52] - 12:16,
14:2, 25:13, 25:21,
27:3, 28:6, 29:8,
30:14, 30:22, 31:15,
32:19, 33:3, 35:17,
38:24, 40:1, 41:1,
51:18, 52:6, 56:8,
61:21, 62:18, 64:15,
70:12, 70:21, 71:17,
88:22, 89:23, 97:2,
98:1, 98:13, 99:13,
103:15, 104:3,
107:11, 114:25,
118:7, 118:25,
124:3, 136:2,
137:18, 140:14,
146:10, 149:20,
154:21, 157:25,
158:10, 160:15,
162:25, 163:1, 163:3
NUMBER [22] - 1:3,
62:13, 68:16, 83:15,
89:6, 105:9, 111:1,
111:4, 124:25,
125:4, 125:9,
125:14, 125:15,
132:1, 132:13,
132:15, 132:21,
138:7, 139:12,
158:15, 158:24,
162:9
NUMBERED [4] -
29:9, 29:25, 150:25,
151:9
NUMBERS [6] - 89:21,
119:1, 142:11,
158:23, 158:24
NURSE [3] - 32:25,
38:6, 39:22
NW [1] - 2:3

O

O'CLOCK [1] - 102:22
OATH [1] - 137:15
OBJECT [4] - 47:25,
58:3, 114:9, 144:23
OBJECTING [2] -
121:13, 126:7
OBJECTION [12] -
10:19, 53:17, 65:18,
87:6, 112:7, 116:1,
121:11, 122:9,
123:5, 137:4,
144:25, 145:1
OBJECTIONS [14] -
7:16, 86:20, 87:17,
88:3, 90:12, 90:23,
91:9, 91:20, 92:11,
148:5, 148:6, 148:9,
148:19, 148:23
OBJECTIVE [1] -
16:12
OBSESSIVE [1] -
63:21
OBVIOUSLY [2] -
47:11, 155:13
OCCASION [1] -
130:22
OCCASIONALLY [1] -
23:25
OCCUPATIONAL [1] -
62:24
OCCUR [2] - 11:18,
11:19
OCCURS [1] - 20:16
OCTOBER [3] - 22:12,
27:5, 56:3
OF [651] - 1:2, 3:6, 3:7,
3:13, 3:22, 4:5, 4:24,
5:1, 5:5, 5:20, 5:21,
5:25, 6:4, 6:8, 6:9,
6:10, 6:12, 6:19,
6:20, 7:2, 7:13, 8:6,
8:7, 8:11, 8:16, 8:22,
9:10, 9:22, 10:1,
10:9, 10:15, 10:16,
10:25, 11:1, 11:3,

11:7, 11:8, 11:10,
 11:11, 11:14, 11:20,
 11:21, 11:22, 12:1,
 12:3, 12:7, 12:13,
 12:16, 12:22, 13:2,
 13:3, 13:15, 13:21,
 14:3, 14:17, 14:20,
 14:22, 14:24, 14:25,
 15:8, 15:23, 16:1,
 16:2, 16:3, 16:11,
 16:12, 16:19, 17:10,
 17:22, 17:23, 18:1,
 18:4, 18:9, 18:15,
 18:16, 18:18, 18:24,
 19:11, 19:15, 19:20,
 19:24, 20:9, 20:12,
 20:13, 20:14, 20:16,
 20:23, 21:1, 21:3,
 21:6, 21:15, 21:18,
 21:19, 21:24, 22:1,
 22:7, 22:11, 22:19,
 22:21, 23:7, 23:9,
 24:5, 24:7, 24:24,
 25:2, 25:10, 25:20,
 25:21, 25:22, 25:23,
 25:24, 25:25, 26:3,
 26:4, 26:12, 26:15,
 27:6, 27:17, 27:18,
 27:20, 27:21, 28:22,
 29:12, 29:20, 30:4,
 30:10, 30:16, 30:24,
 31:1, 31:2, 31:5,
 31:10, 31:12, 32:4,
 32:5, 32:6, 32:7,
 33:3, 33:5, 33:6,
 33:7, 33:8, 33:9,
 33:11, 33:16, 33:24,
 34:1, 34:2, 34:5,
 34:7, 34:12, 34:15,
 35:8, 35:24, 36:1,
 36:3, 36:4, 36:8,
 36:10, 36:20, 36:25,
 37:6, 37:8, 37:25,
 38:3, 38:11, 38:12,
 38:13, 38:16, 38:25,
 39:8, 39:14, 39:15,
 39:20, 39:23, 40:9,
 40:10, 40:11, 40:13,
 40:15, 40:17, 40:19,
 40:21, 40:23, 40:25,
 41:1, 41:17, 41:22,
 41:25, 42:5, 42:19,
 42:20, 43:5, 43:23,
 44:14, 44:15, 46:4,
 46:14, 47:5, 48:1,
 49:21, 49:23, 50:1,
 50:11, 50:13, 51:4,
 51:5, 51:7, 51:14,
 51:15, 51:23, 51:24,
 52:23, 53:1, 53:24,
 54:1, 54:20, 54:21,
 55:1, 55:9, 55:25,
 56:6, 56:9, 56:12,
 56:16, 56:19, 56:21,
 57:6, 57:7, 57:13,
 57:16, 57:18, 57:21,
 57:24, 58:2, 58:17,
 58:19, 58:21, 59:1,
 59:2, 59:5, 60:5,
 60:10, 60:14, 60:19,
 60:20, 61:18, 62:11,
 62:13, 62:14, 62:15,
 62:16, 62:24, 63:2,
 63:7, 63:9, 63:12,
 63:18, 63:22, 64:2,
 64:7, 64:12, 64:14,
 64:18, 65:1, 65:5,
 65:9, 66:5, 66:15,
 66:21, 66:24, 67:3,
 67:6, 67:10, 67:15,
 68:2, 68:5, 68:6,
 68:7, 68:21, 69:10,
 69:13, 70:2, 70:22,
 71:16, 72:3, 72:6,
 72:8, 72:16, 72:21,
 72:22, 72:23, 73:2,
 73:4, 73:11, 73:16,
 74:11, 74:12, 74:23,
 75:5, 75:8, 76:4,
 76:6, 76:7, 77:2,
 77:14, 77:18, 77:22,
 77:23, 78:16, 78:19,
 78:22, 79:1, 79:3,
 79:19, 80:8, 81:2,
 81:16, 81:18, 81:20,
 81:24, 82:1, 82:5,
 82:9, 83:15, 83:17,
 83:19, 84:7, 84:10,
 84:14, 84:16, 84:21,
 84:22, 84:24, 85:2,
 85:14, 85:23, 85:24,
 86:4, 86:5, 86:6,
 86:15, 88:11, 88:14,
 88:17, 88:20, 88:24,
 89:1, 89:8, 92:21,
 92:24, 93:12, 93:15,
 93:17, 93:20, 94:6,
 94:8, 94:9, 94:24,
 95:3, 95:6, 95:9,
 95:14, 95:17, 95:21,
 95:22, 95:25, 96:2,
 96:3, 96:6, 96:19,
 96:21, 96:24, 97:7,
 97:15, 97:20, 97:22,
 98:3, 98:6, 98:10,
 98:11, 99:20, 99:23,
 100:6, 100:10,
 100:12, 100:14,
 100:16, 101:21,
 101:23, 102:4,
 102:8, 102:16,
 103:14, 104:16,
 104:18, 105:1,
 105:3, 105:4, 105:6,
 105:17, 105:19,
 105:22, 105:23,
 106:1, 107:4, 107:6,
 107:9, 107:15,
 107:19, 107:20,
 107:22, 108:1,
 108:5, 108:6, 108:8,
 108:11, 108:12,
 108:15, 108:17,
 108:18, 108:21,
 108:24, 109:2,
 109:5, 110:24,
 111:5, 112:7,
 112:10, 112:12,
 112:15, 112:18,
 112:22, 112:25,
 114:23, 114:24,
 115:7, 115:22,
 116:23, 117:4,
 117:7, 117:13,
 117:17, 118:21,
 118:22, 119:12,
 119:16, 119:23,
 119:25, 120:15,
 121:3, 121:9,
 121:18, 121:25,
 122:3, 122:7,
 122:13, 122:18,
 122:20, 122:22,
 123:2, 123:10,
 124:4, 124:9,
 124:25, 125:24,
 126:3, 126:7,
 126:16, 126:18,
 126:19, 126:21,
 127:7, 127:18,
 128:12, 128:14,
 128:15, 128:19,
 128:21, 128:22,
 128:24, 129:11,
 129:12, 130:19,
 131:4, 131:9,
 131:13, 131:16,
 131:19, 131:22,
 131:24, 131:25,
 132:2, 132:3, 132:4,
 132:8, 132:13,
 132:17, 132:21,
 132:25, 133:17,
 133:18, 133:19,
 133:25, 134:1,
 134:2, 134:11,
 135:24, 136:3,
 138:9, 138:13,
 138:18, 138:19,
 139:2, 139:6,
 139:10, 139:12,
 139:15, 139:17,
 139:20, 141:1,
 141:2, 141:8,
 141:12, 141:23,
 141:24, 142:7,
 142:10, 142:11,
 142:17, 142:23,
 143:3, 143:7,
 143:11, 143:22,
 144:11, 144:13,
 144:14, 144:22,
 145:3, 145:8,
 145:18, 146:4,
 146:14, 146:15,
 146:25, 147:6,
 147:15, 147:18,
 147:23, 147:25,
 148:6, 148:9,
 148:11, 149:5,
 149:14, 149:17,
 149:18, 149:19,
 149:25, 150:7,
 150:11, 150:18,
 150:20, 150:21,
 150:25, 151:1,
 151:5, 151:6,
 152:12, 152:19,
 153:10, 153:13,
 154:9, 154:15,
 154:19, 154:22,
 154:24, 155:4,
 156:5, 156:6, 157:6,
 157:20, 157:23,
 157:24, 158:4,
 158:7, 158:11,
 158:13, 158:22,
 159:17, 159:19,
 159:24, 160:1,
 160:3, 160:5,
 160:12, 160:17,
 160:23, 161:5,
 161:11, 161:19,
 162:3, 162:8, 163:2,
 163:16, 163:21,
 163:24, 164:1,
 164:2, 164:4, 164:21
OFF [5] - 56:21, 73:16,
 127:25, 161:20,
 162:17
OFFERED [1] - 158:17
OFFERS [1] - 10:5
OFFICE [2] - 22:12,
 147:1
OFFICES [1] - 12:12
OFFICIAL [2] - 1:18,
 164:24
OFTEN [9] - 13:23,
 23:8, 37:11, 51:23,
 59:9, 59:10, 59:12,
 59:19, 60:1
OKAY [72] - 3:9, 3:12,
 3:20, 3:21, 26:23,
 28:10, 28:13, 28:14,
 33:6, 38:5, 44:10,
 50:21, 53:21, 54:18,
 55:1, 55:17, 56:4,
 58:12, 60:12, 60:19,
 62:3, 70:16, 72:14,
 78:25, 79:4, 79:17,
 79:20, 80:3, 89:22,
 89:25, 93:6, 98:5,
 103:23, 103:24,
 106:18, 107:2,
 107:4, 109:16,
 113:7, 114:6,
 114:14, 121:5,
 121:15, 124:19,
 125:19, 126:23,
 130:5, 131:3,
 131:25, 132:23,
 135:10, 136:7,
 137:11, 141:19,
 143:19, 144:22,
 144:24, 145:15,
 146:22, 150:17,
 152:2, 155:2,
 155:15, 155:21,
 157:8, 157:14,
 158:12, 160:13,
 161:4, 162:15,
 162:25, 164:14
OKLAHOMA [2] -
 5:10, 46:25
OLD [1] - 32:1
OMINOUS [1] - 3:14
ON [250] - 6:25, 8:11,
 8:20, 9:20, 10:11,
 11:16, 14:12, 14:14,
 16:9, 17:21, 18:24,
 19:24, 22:5, 24:18,
 25:16, 26:15, 26:16,
 26:17, 26:19, 27:4,
 27:9, 27:20, 28:8,
 28:13, 28:23, 32:9,
 32:15, 33:5, 33:21,
 34:5, 34:10, 34:24,
 36:11, 37:3, 37:4,
 37:5, 38:18, 39:2,
 39:23, 41:22, 41:24,
 42:7, 42:13, 42:15,
 42:23, 45:4, 50:14,
 51:1, 51:15, 52:19,
 52:20, 52:22, 53:5,
 53:11, 53:21, 54:19,
 55:15, 57:7, 58:8,
 60:24, 63:21, 63:24,
 65:2, 66:1, 66:14,
 66:25, 67:6, 67:13,
 67:14, 67:16, 67:24,
 68:11, 69:11, 69:18,
 69:22, 69:23, 69:24,
 70:3, 71:12, 71:22,
 72:4, 72:8, 79:19,

80:9, 82:22, 83:5,
84:2, 84:3, 84:4,
84:13, 85:19, 86:13,
87:2, 87:13, 88:10,
88:22, 89:1, 89:2,
89:4, 89:21, 92:17,
95:10, 95:18, 96:10,
96:22, 97:15, 97:20,
97:22, 99:20,
101:22, 102:18,
103:14, 103:19,
103:20, 103:25,
105:6, 106:17,
107:15, 107:21,
108:9, 110:4,
111:11, 111:20,
111:25, 112:19,
112:20, 113:1,
113:3, 113:15,
115:19, 115:23,
117:13, 117:23,
118:2, 118:3,
118:25, 120:5,
120:11, 120:12,
120:15, 121:3,
121:4, 121:6,
121:10, 121:21,
121:24, 122:1,
122:23, 122:24,
124:20, 124:24,
125:3, 125:7, 125:8,
125:11, 125:16,
128:22, 128:23,
129:5, 130:1,
131:11, 132:4,
134:21, 135:1,
135:6, 135:12,
135:13, 136:25,
138:2, 138:11,
138:15, 138:25,
139:1, 139:13,
139:15, 139:17,
139:25, 140:4,
140:5, 140:23,
141:4, 141:5, 141:7,
142:9, 142:10,
142:14, 143:13,
143:17, 143:22,
144:1, 144:6,
144:11, 145:17,
146:9, 146:10,
146:21, 146:22,
147:5, 147:13,
147:17, 147:24,
148:7, 148:8,
148:24, 150:1,
150:2, 150:10,
150:11, 151:5,
151:19, 152:15,
152:21, 153:17,
153:18, 154:7,
154:18, 155:9,
155:12, 155:14,
155:17, 156:3,
156:13, 156:23,
157:4, 157:13,
157:16, 157:19,
157:25, 158:4,
158:7, 158:25,
160:1, 160:5, 160:7,
160:19, 160:22,
161:12, 161:14,
161:15, 162:20,
163:23, 164:2
ONCE [3] - 36:14,
36:15, 141:3
ONE [95] - 3:5, 3:6,
11:7, 11:10, 13:4,
14:8, 14:22, 14:25,
15:5, 15:9, 21:15,
28:13, 29:9, 35:24,
36:8, 37:19, 37:20,
40:8, 40:13, 41:19,
42:23, 43:2, 47:21,
49:21, 50:23, 51:2,
53:3, 53:24, 58:5,
59:2, 59:15, 59:18,
60:15, 66:24, 69:15,
69:16, 69:17, 69:20,
70:3, 71:16, 72:18,
73:9, 73:11, 76:20,
77:16, 78:8, 78:19,
78:22, 79:15, 79:16,
81:24, 83:12, 86:1,
88:22, 89:23, 95:5,
96:21, 99:6, 100:25,
103:14, 106:17,
114:4, 116:13,
119:24, 119:25,
126:1, 129:19,
131:8, 131:25,
132:2, 133:9,
133:24, 138:7,
138:9, 138:10,
139:9, 141:21,
143:10, 144:11,
145:18, 149:15,
149:18, 150:11,
152:12, 153:21,
154:2, 154:8,
154:17, 154:24,
155:8, 156:17,
157:23
ONES [1] - 158:14
ONLY [22] - 3:8, 9:16,
11:17, 20:2, 22:21,
23:20, 23:25, 34:9,
36:16, 38:19, 42:21,
49:3, 53:2, 79:4,
113:2, 140:4,
142:21, 149:14,
153:9, 155:22,
156:3, 156:15
OPENED [1] - 48:3
OPENING [1] - 151:9
OPENS [1] - 3:1
OPINION [3] - 44:18,
44:24, 74:13
OPPORTUNITIES [1] -
152:7
OPPORTUNITY [5] -
136:14, 144:5,
144:18, 154:6,
154:21
OPTION [4] - 105:22,
123:21, 123:23,
123:24
OR [127] - 6:15, 7:25,
9:1, 11:1, 11:6,
11:20, 12:10, 13:4,
13:20, 14:11, 14:16,
14:19, 15:5, 15:6,
15:8, 15:15, 16:4,
16:5, 16:8, 16:13,
19:10, 21:21, 22:2,
24:9, 24:13, 25:1,
26:13, 26:18, 32:11,
33:22, 34:6, 37:15,
37:16, 37:18, 39:7,
39:23, 40:21, 41:5,
41:13, 42:19, 45:25,
46:10, 49:14, 53:4,
53:5, 53:23, 57:10,
59:1, 61:14, 62:13,
62:14, 62:15, 63:20,
64:25, 65:2, 66:23,
68:6, 69:22, 71:9,
72:24, 73:10, 75:10,
79:7, 79:19, 79:21,
83:10, 84:8, 94:13,
95:19, 97:21, 98:2,
98:15, 102:13,
102:24, 104:21,
105:22, 110:25,
112:1, 114:24,
117:9, 120:5,
120:23, 121:10,
122:14, 122:25,
126:3, 126:16,
126:22, 126:24,
127:4, 127:6,
127:13, 127:17,
128:25, 129:4,
130:17, 132:15,
133:22, 139:3,
139:10, 139:19,
139:22, 141:8,
147:7, 151:4, 151:7,
151:14, 151:23,
152:6, 153:21,
154:17, 154:19,
154:25, 156:18,
157:10, 158:20,
158:23, 158:24,
161:13
ORDER [23] - 44:25,
50:8, 53:9, 71:7,
94:23, 142:4,
146:18, 147:1,
147:4, 152:18,
152:19, 152:25,
153:2, 153:8,
153:25, 157:7,
157:16, 157:19,
158:9, 159:4,
159:10, 160:5,
164:14
ORDERED [1] - 159:4
ORDERING [1] -
155:11
ORDINARY [2] -
88:17, 92:23
ORGANIC [1] - 76:20
ORGANIZED [1] -
163:23
ORIENTED [1] -
104:24
ORIGINAL [1] -
124:16
ORLEANS [1] - 5:4
OTHER [42] - 3:13,
7:25, 9:6, 9:10,
11:24, 12:4, 12:5,
13:1, 13:4, 14:14,
20:9, 21:10, 22:7,
27:18, 34:17, 42:16,
42:21, 57:8, 59:1,
62:24, 63:19, 81:8,
98:15, 98:25, 99:10,
101:8, 101:12,
101:16, 109:7,
113:25, 130:19,
137:9, 138:6, 139:3,
141:8, 142:1,
145:25, 153:6,
154:25, 155:17,
162:25
OTHERS [4] - 43:1,
68:9, 77:19, 151:17
OUGHT [1] - 164:3
OUR [14] - 3:14, 11:3,
11:7, 43:4, 48:1,
74:19, 113:20,
140:18, 144:23,
146:9, 147:18,
147:25, 164:13
OURSELVES [1] -
138:23
OUT [50] - 3:19, 8:4,
8:5, 14:4, 24:15,
25:6, 28:9, 35:5,
41:9, 50:3, 54:10,
59:5, 60:17, 62:15,
67:21, 69:6, 74:15,
74:22, 88:22, 95:11,
95:24, 97:1, 97:6,
97:16, 98:4, 99:23,
99:25, 100:5, 100:7,
102:4, 102:5,
109:17, 110:5,
111:5, 112:7,
119:23, 119:25,
139:10, 141:4,
142:1, 143:3, 143:4,
146:19, 148:22,
150:4, 152:12,
155:18, 155:22,
160:20, 161:17
OUTCOME [16] - 86:9,
90:7, 90:18, 91:4,
91:15, 92:1, 92:6,
92:16, 94:19, 99:14,
101:7, 101:11,
101:15, 102:18,
104:4, 105:14
OUTCOMES [1] -
130:17
OUTPATIENT [2] -
23:1, 57:2
OUTREACH [1] -
51:12
OUTSIDE [1] - 9:20
OVER [16] - 15:20,
22:8, 32:21, 39:6,
41:9, 61:15, 76:8,
76:11, 81:5, 82:6,
84:16, 119:13,
139:6, 139:21,
140:21, 142:1
OVERALL [5] - 32:8,
33:14, 41:14, 64:1,
129:12
OVERLAP [1] - 41:12
OVERLEARNED [2] -
14:23, 15:4
OVERRULED [1] -
122:10
OVERWHELMED [3] -
33:10, 33:13, 71:24
OWN [8] - 15:13,
47:23, 48:14, 52:20,
63:16, 151:14,
151:17, 156:11

P

P.I [3] - 159:3, 163:8,
163:19
PA [2] - 1:9, 1:20
PACIFIC [1] - 63:10
PACING [1] - 122:17
PAGE [41] - 16:20,

18:1, 20:24, 22:11,
24:18, 25:14, 25:17,
25:18, 26:8, 26:22,
27:3, 27:4, 27:7,
29:9, 29:20, 29:25,
30:14, 30:22, 32:23,
33:3, 34:16, 36:1,
38:3, 38:9, 39:2,
39:20, 40:3, 40:8,
52:22, 53:3, 62:19,
64:15, 66:12, 70:17,
88:22, 95:12,
128:12, 151:3, 165:9
PAGES [11] - 24:12,
24:14, 24:21, 25:11,
25:15, 26:5, 26:7,
26:11, 147:7, 151:4,
151:7
PAID [1] - 139:5
PAIN [1] - 77:19
PANIC [2] - 13:4,
63:20
PARAGRAPH [21] -
96:12, 96:14, 96:17,
96:19, 99:19, 99:21,
104:9, 104:14,
104:24, 104:25,
106:7, 106:21,
107:1, 107:4, 107:6,
113:17, 119:9,
119:10, 119:16,
128:14, 128:15
PART [33] - 5:6, 5:19,
5:22, 5:23, 6:12,
11:11, 20:14, 30:16,
34:1, 46:4, 51:20,
52:8, 63:1, 66:5,
73:16, 77:22, 82:5,
82:9, 88:11, 105:2,
112:15, 112:17,
121:4, 125:24,
131:16, 131:19,
131:25, 134:1,
134:2, 142:7,
149:11, 152:2,
160:15
PART-TIME [5] - 5:19,
5:22, 5:23, 51:20,
63:1
PARTICULAR [28] -
5:11, 18:17, 51:4,
55:11, 55:15, 59:11,
74:21, 94:7, 97:9,
112:3, 112:15,
116:10, 117:15,
117:23, 119:15,
130:24, 135:12,
136:7, 136:20,
137:10, 138:3,
138:11, 138:25,
139:13, 142:8,
142:15, 142:25,
145:13
PARTICULARLY [4] -
51:3, 101:22,
107:17, 138:8
PARTIES [2] - 153:4,
159:5
PARTS [1] - 46:6
PASS [3] - 115:9,
116:12, 133:9
PASSAGES [1] -
140:9
PASSING [3] - 27:18,
33:11, 149:7
PAST [16] - 19:11,
22:19, 28:12, 49:9,
52:4, 52:12, 52:14,
53:1, 53:23, 54:3,
60:4, 82:6, 154:17,
154:19, 156:5,
162:17
PATHOLOGIES [1] -
140:1
PATIENT [24] - 12:19,
13:24, 13:25, 17:7,
29:21, 35:1, 37:16,
49:11, 49:16, 50:23,
53:11, 53:15, 57:24,
58:18, 59:18, 59:25,
60:2, 60:4, 60:21,
60:23, 70:7, 72:15,
115:6
PATIENT'S [6] - 41:23,
52:3, 57:6, 60:12,
60:19, 60:20
PATIENTS [20] - 6:25,
7:4, 7:5, 7:9, 8:19,
8:21, 11:25, 14:15,
34:3, 42:15, 51:1,
51:3, 51:6, 51:11,
51:13, 51:18, 51:23,
59:10, 74:14, 74:16
PAUSES [1] - 134:7
PAXIL [1] - 23:22
PAY [1] - 34:5
PAYING [1] - 143:3
PDR [1] - 56:18
PE [1] - 61:22
PEAKING [1] - 31:2
PENNSYLVANIA [1] -
1:2
PEOPLE [24] - 8:12,
12:4, 12:20, 12:25,
18:13, 18:14, 20:8,
21:20, 26:16, 27:25,
34:14, 41:8, 42:19,
44:20, 57:20, 61:14,
64:8, 69:19, 69:21,
74:18, 111:25,
138:13, 149:5,
153:22
PEOPLE'S [1] - 42:16
PER [6] - 13:11, 57:18,
65:13, 95:21,
104:22, 118:9
PERCEIVE [2] - 63:11,
74:14
PERCENT [10] -
21:13, 21:17, 22:15,
28:3, 44:25, 52:1,
52:2, 105:6, 111:7,
162:14
PERCENTAGE [4] -
111:5, 138:18,
138:19
PERCENTILE [1] -
67:4
PERCEPTION [2] -
32:4, 63:15
PERFECT [1] - 152:22
PERFORM [2] - 50:2,
153:21
PERFORMANCE [28]
- 11:6, 15:16, 49:25,
50:22, 68:5, 73:14,
74:7, 75:2, 82:7,
82:8, 83:21, 97:17,
97:24, 98:11, 99:3,
100:17, 100:20,
100:24, 101:3,
101:23, 111:11,
122:18, 127:6,
128:19, 128:21,
128:23, 129:5,
133:21
PERFORMED [1] -
66:4
PERFORMING [1] -
75:1
PERFORMS [1] -
115:7
PERHAPS [2] - 93:14,
97:19
PERIOD [2] - 82:16,
83:4
PERIODS [1] - 82:21
PERKINS [1] - 2:2
PERMANENT [1] -
61:15
PERMISSIBLE [2] -
156:6, 156:16
PERSON [15] - 13:14,
14:3, 42:14, 50:6,
50:15, 58:1, 61:1,
67:15, 72:19, 73:20,
74:3, 74:6, 77:11,
117:19, 126:14
PERSON'S [3] - 18:20,
43:2, 78:4
PERSONAL [6] - 16:5,
18:2, 18:6, 18:21,
18:22, 147:9
PERSONALLY [3] -
50:23, 50:25, 131:24
PERSPECTIVE [4] -
20:21, 42:15, 43:2,
44:13
PERSUASIVELY [1] -
14:18
PERSUASIVENESS
[1] - 12:14
PERTAINS [1] - 89:16
PERVASIVE [4] -
11:19, 20:12, 20:22,
63:16
PERVASIVENESS [1]
- 11:13
PHILADELPHIA [2] -
1:9, 1:20
PHILOSOPHY [1] -
68:12
PHOBIAS [1] - 15:15
PHQ [3] - 13:7, 13:8
PHQ9 [2] - 13:8, 13:21
PHRASE [1] - 158:10
PHYSICAL [3] - 29:21,
30:7, 32:5
PHYSICALLY [2] -
7:4, 49:12
PHYSICIAN [8] - 5:7,
9:13, 10:7, 52:19,
53:10, 53:14, 55:2,
55:16
PHYSICIANS [1] -
60:25
PICK [2] - 138:23,
141:3
PICKED [1] - 124:6
PICTURE [4] - 41:19,
44:17, 88:8, 103:19
PIECE [3] - 3:5,
115:10, 156:1
PILL [2] - 54:4, 56:16
PIN [1] - 103:19
PINKING [1] - 40:20
PJX [2] - 165:10,
165:11
PLAINTIFF [10] - 1:4,
16:18, 48:25, 149:9,
150:2, 150:15,
152:7, 152:8, 152:9,
152:20
PLAINTIFF'S [1] -
150:13
PLAINTIFFS [1] -
65:20
PLAN [2] - 3:9, 31:8
PLANNING [2] -
111:25, 161:2
PLATFORM [4] -
138:11, 138:12,
138:15, 142:9
PLEASE [54] - 4:9,
4:12, 4:15, 29:9,
32:23, 40:9, 47:7,
47:8, 52:8, 54:19,
54:24, 55:13, 55:24,
57:1, 62:10, 63:6,
64:16, 64:20, 64:21,
67:20, 68:25, 69:1,
70:11, 71:18, 75:15,
78:8, 80:12, 80:14,
80:18, 105:14,
113:9, 113:10,
113:12, 113:20,
113:22, 114:19,
115:14, 115:22,
116:25, 118:24,
119:2, 119:7, 120:5,
123:6, 123:15,
124:21, 127:2,
128:1, 128:9,
128:15, 137:20,
156:12
PLENTY [1] - 151:5
PLUS [2] - 76:4,
139:18
POINT [4] - 48:8,
108:3, 131:4, 140:6
POINTS [2] - 114:23,
114:24
POLICIES [1] - 84:2
POLITICAL [1] - 4:25
POP [1] - 51:17
POPULATION [5] -
16:15, 42:12, 43:1,
65:14, 153:23
PORTION [1] - 107:9
POSITION [4] - 51:20,
81:1, 81:4, 81:10
POSITIONS [1] - 81:8
POSITIVE [3] - 13:15,
34:21, 38:14
POSSIBILITY [1] -
14:20
POSSIBLE [10] -
64:14, 77:4, 78:1,
96:13, 115:5, 121:1,
121:8, 124:8, 148:6,
163:8
POSSIBLY [1] -
124:15
POST [1] - 146:12
POTENTIAL [2] -
93:17, 112:23
POTENTIALLY [4] -
57:8, 108:9, 124:18,
131:12
POUND [1] - 57:18

POWERFUL ^[1] - 75:3
PRACTICAL ^[2] - 139:22, 148:15
PRACTICALITY ^[1] - 131:8
PRACTICE ^[11] - 5:8, 6:2, 6:4, 7:9, 37:9, 42:5, 46:4, 51:5, 51:9, 73:3, 162:19
PRACTICES ^[4] - 9:14, 10:7, 10:18
PRACTICING ^[2] - 8:25, 12:17
PRACTITIONERS ^[1] - 9:11
PRE ^[1] - 72:16
PRECEDING ^[1] - 101:4
PRECISE ^[3] - 111:1, 111:4, 123:2
PRECLERKSHIP ^[2] - 82:16, 82:21
PREDICTABLE ^[1] - 129:4
PREEMPTIVELY ^[1] - 104:17
PREFER ^[1] - 50:5
PREFERRED ^[1] - 19:17
PRELIMINARY ^[5] - 43:21, 43:24, 44:8, 70:5, 163:6
PREMATURE ^[1] - 72:20
PREP ^[3] - 139:5, 139:7, 140:21
PREPARED ^[1] - 9:6
PREPARING ^[1] - 129:25
PREPONDERANCE ^[3] - 105:21, 132:7, 142:17
PREPPED ^[1] - 140:23
PRESCRIBE ^[5] - 9:3, 54:4, 54:16, 56:19, 59:16
PRESCRIBED ^[8] - 9:1, 12:25, 23:13, 24:7, 57:24, 58:18, 59:19, 60:24
PRESCRIBING ^[5] - 9:14, 12:23, 26:2, 49:18, 54:8
PRESCRIPTION ^[5] - 10:6, 23:20, 57:7, 60:9, 60:13
PRESENT ^[13] - 26:9, 30:4, 30:24, 33:5, 33:7, 38:11, 39:2, 39:14, 40:9, 40:10, 46:19, 70:22, 154:16
PRESENTATION ^[2] - 39:4, 69:8
PRESENTED ^[2] - 106:14, 163:24
PRESENTING ^[1] - 12:8
PRESENTS ^[2] - 12:7, 88:25
PRESIDENT ^[2] - 81:2, 82:1
PRESSURE ^[5] - 32:1, 33:10, 77:20, 143:15, 160:7
PRETRIAL ^[6] - 153:25, 155:23, 155:24, 155:25, 156:4, 156:22
PRETTY ^[5] - 45:12, 75:3, 144:2, 153:24, 158:3
PREVAIL ^[1] - 152:14
PREVALENCE ^[2] - 63:4, 64:14
PREVALENT ^[1] - 63:12
PREVENT ^[1] - 31:25
PREVENTS ^[1] - 11:15
PREVIOUS ^[2] - 97:23, 98:17
PREVIOUSLY ^[1] - 104:4
PRIMARILY ^[3] - 28:8, 46:5, 46:8
PRIMARY ^[5] - 31:22, 51:14, 54:11, 77:16, 132:21
PRIME ^[1] - 70:8
PRIOR ^[11] - 19:9, 19:19, 26:8, 29:23, 53:7, 53:18, 72:3, 73:4, 81:10, 98:21, 99:17
PRIVATE ^[5] - 6:2, 7:9, 51:9, 73:2, 162:19
PRO ^[4] - 1:15, 163:12, 163:15, 163:17
PROBABLY ^[19] - 12:24, 45:23, 45:24, 47:18, 49:14, 74:8, 74:10, 75:1, 75:23, 104:21, 109:22, 145:20, 150:24, 151:22, 160:24, 163:10, 163:11, 163:13, 163:18
PROBLEM ^[11] - 20:12, 64:10, 74:2, 74:17, 77:18, 78:10, 111:15, 159:1, 159:2, 161:4
PROBLEMS ^[3] - 17:22, 67:6, 67:7
PROCEDURES ^[4] - 66:4, 66:7, 133:18, 146:22
PROCEED ^[3] - 4:3, 35:23, 45:8
PROCEEDINGS ^[2] - 1:22, 164:21
PROCESS ^[10] - 6:10, 6:20, 6:21, 9:8, 33:14, 50:13, 68:6, 130:14, 133:17, 139:4
PRODUCED ^[3] - 1:22, 44:3, 85:11
PROFESSIONAL ^[4] - 6:12, 11:25, 46:1, 74:13
PROFESSIONALISM ^[2] - 163:22, 164:5
PROFESSIONALS ^[4] - 9:7, 9:10, 11:24, 71:7
PROFESSOR ^[1] - 63:2
PROGRAM ^[4] - 51:12, 81:3, 83:11, 138:7
PROGRAMS ^[2] - 139:5, 141:8
PROGRESS ^[5] - 32:20, 36:4, 38:2, 40:2, 150:8
PROMETRIC ^[3] - 27:3, 27:5, 135:12
PROMISES ^[1] - 160:25
PROOF ^[1] - 70:2
PROPER ^[1] - 23:19
PROPORTION ^[1] - 62:15
PROPOSE ^[3] - 151:14, 151:24, 153:4
PROPOSED ^[5] - 149:17, 150:20, 150:24, 150:25, 151:22
PROPOSING ^[1] - 151:10
PROPRANOLOL ^[2] - 32:1, 32:7
PROTECTING ^[1] - 83:19
PROTECTION ^[1] - 6:20
PROVEN ^[1] - 74:10
PROVIDE ^[6] - 6:21, 18:12, 21:22, 22:17, 26:11, 136:24
PROVIDED ^[9] - 27:10, 49:5, 71:13, 89:3, 96:8, 130:18, 137:24, 142:21, 154:4
PROVIDERS ^[1] - 71:13
PROVIDES ^[2] - 85:12, 130:23
PROVIDING ^[1] - 5:24
PROVISION ^[1] - 8:3
PROZAC ^[2] - 23:22, 38:16
PSYCHIATRIC ^[9] - 15:8, 15:18, 20:22, 29:21, 31:5, 34:18, 49:19, 53:23, 54:13
PSYCHIATRIST ^[4] - 8:25, 9:5, 57:5, 74:13
PSYCHIATRISTS ^[1] - 9:10
PSYCHIATRY ^[9] - 5:2, 5:3, 5:13, 5:14, 5:15, 5:21, 6:6, 6:7, 6:8
PSYCHOLOGICAL ^[2] - 42:3, 49:20
PSYCHOLOGIST ^[2] - 49:21, 55:8
PSYCHOLOGY ^[1] - 81:22
PSYCHOMETRIC ^[1] - 131:21
PSYCHOMETRICIAN ^[7] - 81:11, 81:12, 81:14, 81:15, 82:2, 82:5, 110:16
PSYCHOMETRICS ^[3] - 81:11, 81:12, 81:24
PSYCHOTHERAPY ^[1] - 12:11
PUBLIC ^[2] - 83:19, 157:10
PUBLICATION ^[1] - 8:1
PUBLICATIONS ^[1] - 8:5
PUBLISHED ^[1] - 8:3
PULL ^[54] - 7:11, 16:16, 28:8, 29:3, 31:16, 32:19, 35:25, 38:1, 38:24, 40:1, 47:7, 52:6, 61:21, 65:24, 70:12, 75:15, 85:1, 85:4, 85:6, 86:25, 87:22, 88:21, 90:17, 91:3, 91:14, 91:25, 94:16, 96:9, 98:4, 99:13, 100:2, 101:25, 104:3, 104:8, 107:11, 107:23, 108:13, 108:19, 108:25, 112:5, 113:9, 115:14, 116:25, 118:24, 118:25, 119:1, 119:2, 119:23, 119:25, 127:2, 127:3, 127:22, 128:8
PURPOSE ^[5] - 23:15, 39:15, 41:24, 126:19, 126:21
PURPOSED ^[1] - 149:25
PURPOSELY ^[1] - 142:5
PURPOSES ^[1] - 131:10
PUSH ^[1] - 160:12
PUT ^[17] - 7:1, 17:7, 17:8, 50:9, 119:19, 122:8, 140:6, 142:13, 142:23, 146:9, 146:16, 155:13, 155:18, 158:9, 158:24, 159:13, 161:12
PUTTING ^[2] - 25:24, 143:12
PUZZLE ^[1] - 110:5
PX ^[2] - 127:24, 128:8
PX03 ^[1] - 55:14
PX19 ^[1] - 31:17
PX2 ^[1] - 16:16
PX3 ^[1] - 52:6
PX30 ^[1] - 65:25
PX35 ^[1] - 39:20
PX37 ^[4] - 32:19, 35:25, 71:17
PX46 ^[1] - 40:1
PX49 ^[2] - 61:22, 65:17
PX52 ^[1] - 27:11
PX53 ^[2] - 115:14, 128:8
PX6 ^[1] - 28:9
PX9 ^[1] - 28:23

Q

QUALIFIED ^[3] - 50:7, 126:3, 126:7
QUALIFY ^[1] - 21:5
QUANTITATIVE ^[1] - 81:22

QUESTION [83] - 15:9,
15:23, 28:23, 41:19,
48:12, 49:10, 55:18,
58:14, 60:22, 63:14,
77:3, 78:25, 82:11,
93:19, 93:21, 95:18,
99:16, 104:6,
104:17, 104:22,
105:13, 107:13,
109:24, 109:25,
110:4, 114:11,
116:4, 118:20,
121:12, 124:14,
124:20, 125:7,
125:11, 125:17,
126:10, 126:22,
129:2, 129:19,
131:3, 132:6,
132:11, 132:16,
134:11, 135:1,
135:6, 135:13,
135:14, 137:11,
139:14, 139:16,
140:2, 140:3, 140:9,
141:5, 141:13,
142:8, 142:15,
143:17, 153:17,
153:25, 154:1,
154:2, 154:11,
154:12, 154:15,
154:17, 154:22,
154:23, 154:24,
155:7, 155:9,
155:20, 156:9,
156:14, 156:24,
157:1, 157:6,
157:20, 158:2,
159:20, 160:21,
161:8
QUESTIONING [1] -
35:25
QUESTIONNAIRE [2]
- 13:9, 13:16
QUESTIONS [76] -
13:13, 13:15, 13:22,
14:5, 45:4, 66:20,
78:12, 78:17, 79:5,
96:22, 96:25, 97:6,
99:24, 100:6, 102:5,
104:18, 104:20,
105:4, 105:7, 109:7,
109:22, 110:4,
110:6, 111:20,
111:22, 112:11,
119:17, 120:11,
120:24, 121:3,
121:6, 121:7,
121:24, 121:25,
122:1, 122:4,
124:25, 128:2,
129:15, 130:3,

130:6, 130:10,
131:18, 132:24,
133:2, 133:5, 134:4,
134:9, 135:17,
139:9, 139:10,
139:18, 141:24,
142:2, 142:4, 142:5,
142:11, 143:13,
143:14, 143:20,
143:21, 144:21,
153:16, 155:6,
155:8, 155:15,
155:21, 156:10,
156:25, 157:2,
157:4, 157:16,
157:24, 158:12,
162:25
QUICK [1] - 79:23
QUICKLY [2] - 64:24,
139:20
QUITE [2] - 109:18,
153:1
QUOTE [1] - 69:15

R

RAISE [3] - 4:12,
80:14, 137:9
RAISED [1] - 136:13
RAISES [2] - 132:16,
157:2
RAN [8] - 97:1, 97:6,
99:23, 99:25, 100:5,
100:7, 102:4, 102:5
RANDOM [1] - 100:10
RANDOMLY [7] -
96:25, 97:5, 97:9,
99:25, 100:7, 102:5,
120:11
RANGE [2] - 115:2,
115:3
RAPID [1] - 122:21
RARE [1] - 130:15
RATE [1] - 32:6
RATES [1] - 21:6
RATHER [4] - 89:20,
98:9, 101:19, 129:12
RATIO [1] - 12:22
RAW [1] - 66:25
REACH [1] - 97:17
READ [36] - 15:3,
43:17, 43:20, 43:23,
44:5, 44:7, 52:14,
55:5, 58:10, 58:11,
62:7, 63:5, 64:20,
69:6, 76:3, 96:13,
104:12, 104:13,
104:15, 104:23,
105:3, 105:7, 107:9,
113:22, 114:19,

115:1, 115:11,
115:16, 115:17,
119:13, 122:23,
122:24, 128:13,
139:20, 140:9, 153:2
READINESS [2] -
112:3, 113:25
READING [6] - 14:21,
14:22, 14:25, 16:11,
34:25, 141:17
READS [1] - 99:23
READY [10] - 35:20,
45:6, 79:21, 80:6,
103:3, 103:8,
109:10, 115:4,
116:17, 137:14
REAL [5] - 20:22,
40:15, 72:7, 147:22,
163:21
REALIZE [1] - 36:17
REALLY [26] - 12:20,
15:13, 17:10, 19:21,
20:20, 21:8, 22:19,
31:4, 34:13, 40:14,
42:23, 47:18, 47:25,
63:14, 74:10, 77:1,
97:13, 136:12,
139:9, 139:20,
139:22, 147:23,
148:20, 158:1,
160:15, 163:24
REALM [1] - 20:2
REASK [1] - 60:22
REASON [9] - 64:7,
67:9, 67:17, 69:9,
74:14, 103:20,
113:2, 131:15,
139:17
REASONABLE [4] -
34:8, 77:2, 82:23,
155:2
REASONABLY [1] -
38:20
REASONS [3] -
152:13, 155:10,
157:23
REASSURED [1] -
163:20
REBUTTAL [1] - 136:3
RECALL [3] - 94:25,
95:19, 136:9
RECEIVE [2] - 73:25,
84:12
RECEIVED [2] - 86:10,
89:11
RECENT [2] - 31:15,
40:11
RECENTLY [3] - 39:9,
56:18, 69:12
RECESS [3] - 35:19,

80:4, 103:1
RECOGNIZE [12] -
52:9, 61:23, 66:9,
66:11, 70:13, 71:19,
71:25, 75:16,
115:18, 117:1,
119:3, 120:2
RECOGNIZED [5] -
6:8, 7:25, 13:5,
15:10, 17:3
RECOLLECTION [1] -
104:16
RECOMMEND [2] -
39:22, 60:6
RECOMMENDED [1] -
56:22
RECORD [74] - 4:16,
16:5, 16:7, 17:8,
19:14, 20:7, 24:10,
24:15, 26:9, 26:25,
27:4, 27:8, 27:14,
27:16, 28:10, 28:19,
28:24, 29:4, 29:11,
29:18, 30:1, 30:15,
30:18, 30:23, 31:19,
36:15, 36:24, 37:3,
38:7, 38:25, 39:1,
39:21, 47:25, 48:18,
53:8, 55:25, 56:5,
64:20, 65:17, 68:16,
69:6, 70:1, 75:19,
80:19, 87:5, 87:16,
88:2, 89:24, 90:11,
90:22, 91:8, 91:19,
92:5, 92:10, 104:13,
104:15, 106:10,
111:3, 111:13,
119:4, 119:8, 122:3,
127:23, 145:4,
145:9, 149:3,
151:11, 151:19,
153:13, 153:18,
153:19, 154:7,
155:1, 164:21
RECORDED [1] - 1:22
RECORDS [32] - 9:6,
9:10, 10:1, 10:8,
11:23, 12:4, 12:15,
13:6, 13:11, 14:2,
15:25, 20:12, 25:6,
31:15, 40:16, 40:25,
43:6, 43:10, 43:13,
43:15, 44:10, 44:23,
49:5, 52:8, 53:15,
55:10, 72:17, 72:25,
73:3, 73:7, 73:17,
92:16
RECROSS [3] -
129:17, 129:22,
165:2

REDACTIONS [2] -
89:7, 147:9
REDIRECT [7] - 78:14,
78:15, 110:4, 128:4,
128:6, 133:11, 165:2
REDUCE [1] - 23:12
REDUCED [1] - 73:14
REFER [5] - 25:5,
49:18, 49:20, 50:3,
50:5
REFERENCE [9] -
17:1, 22:25, 24:2,
33:20, 73:19,
106:14, 106:20,
107:17, 108:3
REFERENCED [1] -
93:19
REFERENCES [1] -
13:6
REFERENCING [1] -
115:10
REFERRAL [1] - 31:12
REFERRED [4] - 9:18,
19:14, 25:2, 50:15
REFERRING [5] -
31:13, 33:12,
106:12, 123:11,
124:9
REFLECT [3] - 97:5,
102:3, 105:16
REFLECTING [1] -
27:20
REFLECTS [1] - 93:15
REFRACTORY [1] -
6:5
REFUNDED [3] -
117:9, 117:12,
117:20
REGARDING [3] -
29:1, 110:20, 120:21
REGARDLESS [2] -
15:8, 59:6
REGIMENT [1] - 71:4
REGISTERING [1] -
115:25
REGULAR [2] - 6:25,
117:9
REGULARLY [3] -
8:12, 8:24, 9:6
REGULATION [1] -
59:5
REITERATE [1] -
101:17
REJOIN [1] - 35:18
RELATED [8] - 22:18,
22:22, 30:21, 31:5,
40:18, 62:23, 85:20,
88:25
RELATES [2] - 99:16,
139:23

RELATION [1] - 39:18
RELATIVE [5] - 30:12, 33:8, 33:25, 40:12, 96:7
RELATIVELY [3] - 97:24, 106:4, 109:22
RELEASE [1] - 56:17
RELEVANCE [1] - 145:14
RELEVANT [13] - 27:25, 28:19, 30:19, 44:20, 48:19, 104:7, 112:11, 139:25, 145:22, 148:10, 153:22, 154:16, 155:1
RELIABLE [2] - 49:15, 81:19
RELIEF [2] - 39:7, 156:6
RELY [5] - 41:22, 43:2, 50:14, 52:19, 52:20
REMAINING [3] - 102:15, 108:5, 117:15
REMAINS [1] - 98:8
REMARKABLY [1] - 23:7
REMEDY [1] - 154:18
REMEMBER [4] - 109:14, 132:1, 132:9, 155:6
REMIND [1] - 137:15
REMINDED [1] - 106:9
REMINDER [1] - 3:6
REMOTE [1] - 103:24
REMOVE [5] - 70:11, 89:14, 89:19, 124:22, 125:20
REMOVED [1] - 21:22
REPARABLE [2] - 138:6, 138:9
REPEAT [1] - 155:24
REPETITIVE [1] - 78:20
REPHRASE [2] - 116:6, 126:10
REPLY [3] - 151:21, 152:6
REPORT [21] - 26:15, 27:12, 35:4, 38:13, 40:6, 41:23, 43:5, 43:17, 62:22, 66:11, 66:15, 66:20, 66:23, 67:6, 67:14, 70:9, 85:11, 85:16, 88:24, 88:25, 128:9
REPORTED [11] - 34:20, 41:18, 66:23,

70:9, 84:3, 84:4, 99:6, 99:10, 101:8, 101:12, 114:23
REPORTEDLY [1] - 53:23
REPORTER [7] - 1:18, 4:11, 4:15, 80:14, 80:18, 159:17, 164:24
REPORTING [2] - 19:22, 41:1
REPORTS [4] - 39:6, 40:13, 44:5, 94:20
REPRESENT [4] - 16:17, 24:13, 89:5, 138:12
REPRESENTATION [6] - 90:6, 122:7, 123:2, 124:4, 129:11, 138:4
REPRESENTING [1] - 159:22
REPRESENTS [8] - 94:1, 94:5, 94:10, 94:23, 95:5, 95:9, 128:18, 138:13
REQUEST [12] - 10:17, 15:21, 16:18, 19:25, 21:13, 21:25, 22:15, 27:21, 28:3, 30:16, 43:7, 154:4
REQUESTED [1] - 158:16
REQUESTING [2] - 15:24, 39:17
REQUESTS [4] - 9:19, 10:3, 10:9, 78:23
REQUIRE [2] - 21:20, 143:10
REQUIRED [1] - 38:20
REQUIREMENTS [2] - 47:23, 48:15
RESEARCH [6] - 15:18, 21:18, 26:16, 69:11, 74:24, 156:11
RESIDENCY [3] - 5:2, 5:12, 83:9
RESIDENTS [4] - 7:3, 7:4, 9:3, 37:13
RESIDUAL [1] - 61:16
RESOLVE [1] - 102:14
RESOLVED [1] - 147:22
RESOURCES [2] - 131:11, 138:6
RESP [1] - 123:17
RESPECT [7] - 99:21, 100:13, 100:21, 100:25, 116:23, 129:5, 141:21

RESPOND [6] - 145:23, 151:12, 151:24, 152:15
RESPONDING [3] - 105:24, 122:21, 145:19
RESPONSE [17] - 11:2, 69:25, 79:7, 89:3, 95:7, 105:22, 123:17, 123:24, 124:16, 124:17, 125:7, 125:12, 125:17, 130:16, 132:8, 150:13
RESPONSES [3] - 67:15, 105:20, 132:22
RESPONSIBILITIES [1] - 160:1
RESPONSIBILITY [2] - 6:1, 6:11
RESPONSIVE [3] - 148:4, 149:24, 149:25
REST [3] - 28:13, 34:5, 105:4
RESTRICTING [1] - 136:12
RESTS [1] - 135:25
RESULT [4] - 15:6, 22:22, 128:24, 130:20
RESULTING [1] - 72:7
RESULTS [14] - 27:17, 50:11, 50:20, 66:13, 66:15, 68:2, 68:22, 68:23, 69:1, 113:24, 130:13, 130:14, 154:19, 156:5
RESUME [5] - 3:9, 80:1, 102:21, 103:8, 137:13
RETURN [1] - 137:10
REVIEW [27] - 6:2, 9:6, 9:19, 10:9, 10:16, 11:22, 20:11, 37:6, 44:2, 44:18, 44:24, 49:3, 59:10, 85:10, 86:13, 87:1, 87:12, 87:23, 88:9, 88:17, 102:1, 102:12, 102:18, 107:12, 111:8, 111:10, 124:8
REVIEWED [10] - 12:3, 18:22, 43:6, 43:7, 44:10, 44:23, 50:19, 83:21, 97:4, 144:12
REVIEWER [3] - 9:21,

10:18, 18:5
REVIEWERS [1] - 78:23
REVIEWING [4] - 6:14, 6:15, 44:11, 44:14
REVIEWS [3] - 9:23, 88:16, 93:2
RICHMOND [2] - 1:16, 45:14
RID [1] - 71:16
RIGHT [63] - 3:11, 3:22, 4:2, 4:12, 22:2, 25:19, 29:20, 35:15, 35:18, 36:6, 36:23, 45:5, 45:8, 47:3, 50:4, 50:16, 51:22, 52:21, 54:15, 55:4, 56:1, 57:14, 58:16, 70:14, 72:5, 76:7, 78:13, 79:14, 80:5, 80:15, 88:22, 90:5, 95:14, 102:22, 102:25, 103:2, 103:18, 109:9, 109:12, 110:6, 115:19, 116:22, 118:3, 118:6, 118:7, 127:21, 129:16, 129:21, 132:23, 133:7, 135:19, 136:1, 137:3, 143:1, 144:17, 153:10, 157:4, 157:25, 158:12, 163:2, 163:3, 164:8
RISE [2] - 11:19, 12:1
RISES [1] - 12:13
RISK [2] - 12:21, 12:22
RMR [2] - 1:18, 164:25
ROLE [3] - 82:9, 110:22, 112:15
ROOM [1] - 1:19
ROPED [1] - 84:7
ROUGHLY [3] - 45:20, 125:2, 138:10
ROUND [1] - 151:6
ROUNDS [1] - 152:6
ROUTINE [1] - 9:8
ROUTINELY [4] - 9:12, 10:4, 13:2, 88:10
ROYAL [1] - 51:12
RULE [1] - 117:6
RULES [1] - 83:11
RULING [1] - 160:19
RUN [2] - 143:3, 146:11
RUNDOWN [1] - 43:5

RUNNING [3] - 11:7, 97:16, 140:18
RUNS [1] - 95:13
RURAL [2] - 51:15, 51:24
RUSH [2] - 159:11, 159:14
RUSHED [1] - 97:18
RUSHING [1] - 97:13

S

SAD [1] - 71:23
SAFE [4] - 23:8, 23:13, 118:21, 135:3
SAID [16] - 10:14, 19:21, 46:25, 58:25, 68:24, 94:9, 109:14, 110:19, 117:22, 118:1, 120:22, 124:20, 134:17, 156:1, 156:2, 162:20
SAKE [6] - 55:1, 66:9, 90:2, 116:23, 119:12, 126:23
SALTS [1] - 24:5
SAME [30] - 7:3, 23:23, 36:12, 41:10, 42:17, 55:2, 55:9, 57:14, 68:6, 68:11, 71:11, 75:9, 84:23, 97:23, 97:25, 104:19, 106:11, 123:4, 128:20, 128:21, 129:3, 129:4, 129:7, 134:24, 143:22, 148:7, 149:5, 152:15, 154:8
SANCTION [1] - 83:25
SANCTIONS [1] - 83:24
SATISFIED [1] - 158:6
SAVE [1] - 137:7
SAVINGS [1] - 160:10
SAW [6] - 19:19, 53:5, 94:24, 95:3, 95:4, 139:17
SAY [38] - 20:4, 23:16, 23:18, 25:2, 25:25, 29:5, 29:21, 41:13, 48:8, 58:22, 59:15, 60:17, 60:21, 68:16, 70:3, 81:15, 86:9, 110:2, 118:21, 131:7, 131:15, 135:1, 135:3, 136:17, 139:13, 139:21, 142:22, 151:13, 153:3,

154:24, 156:2,
156:3, 157:15,
157:17, 158:1,
159:21, 160:9, 163:5
SAYING [7] - 3:14,
22:8, 37:22, 70:2,
119:16, 137:22,
155:22
SAYS [36] - 8:8, 13:22,
25:22, 26:14, 29:17,
33:14, 33:21, 39:9,
39:17, 52:12, 52:16,
56:1, 57:2, 58:7,
58:9, 62:8, 62:19,
63:4, 66:6, 68:13,
69:3, 70:21, 71:23,
105:2, 107:7,
113:19, 114:7,
114:25, 115:16,
117:6, 119:19,
123:16, 125:3, 155:7
SCALE [4] - 67:13,
67:19, 69:19, 70:8
SCALES [1] - 152:19
SCENES [1] - 162:1
SCHEDULE [1] -
159:13
SCHOOL [7] - 34:6,
44:2, 49:5, 73:14,
82:18, 110:25, 111:8
SCIENCE [5] - 4:25,
27:10, 76:3, 81:17,
111:18
SCIENTIFIC [1] - 6:21
SCOPE [3] - 48:1,
112:7, 112:10
SCORE [27] - 27:12,
27:19, 44:5, 66:25,
67:1, 68:13, 68:17,
68:18, 69:19, 69:24,
84:3, 89:2, 95:5,
111:9, 114:22,
114:23, 115:2,
115:16, 115:23,
116:11, 128:9,
128:16, 128:18,
128:25, 129:1, 129:4
SCORES [5] - 67:2,
67:3, 68:15, 115:18,
133:25
SCORING [1] - 81:18
SCREEN [6] - 24:19,
28:13, 66:2, 67:24,
113:15, 115:23
SCREENER [1] -
13:17
SCREENING [3] -
13:11, 13:23, 14:7
SCREENS [1] - 133:24
SCROLL [49] - 22:24,
24:15, 24:17, 28:11,
28:13, 29:12, 30:6,
30:24, 32:21, 38:4,
39:2, 40:4, 47:8,
54:18, 54:23, 55:24,
57:1, 62:18, 64:15,
66:6, 66:12, 67:12,
67:20, 68:24, 68:25,
70:16, 70:17, 70:18,
70:25, 76:5, 76:11,
76:12, 88:21, 95:11,
96:17, 96:18, 104:9,
104:14, 108:3,
113:12, 114:7,
114:25, 115:21,
116:2, 118:6, 118:7,
128:10
SCROLLED [1] -
30:20
SCROLLING [2] -
33:4, 104:12
SE [4] - 1:15, 163:12,
163:15, 163:17
SECOND [20] - 25:17,
25:18, 34:16, 62:18,
68:21, 78:8, 78:25,
82:15, 82:18, 83:10,
97:16, 107:17,
128:14, 129:4,
129:11, 147:3,
150:1, 151:6, 154:1,
155:5
SECONDS [13] -
95:21, 95:25, 96:3,
104:22, 117:24,
118:2, 118:19,
124:25, 125:1,
125:8, 125:13,
139:18, 139:19
SECTION [26] - 18:1,
31:9, 34:19, 62:1,
63:5, 84:8, 84:20,
93:17, 93:23, 93:24,
94:1, 94:4, 94:7,
94:11, 94:12, 94:14,
94:15, 94:23, 95:5,
96:1, 96:2, 97:15,
97:20, 100:11,
122:13, 122:19
SECTIONS [11] - 84:7,
84:21, 84:22, 85:13,
93:16, 93:21, 95:1,
98:11, 101:20,
102:15, 122:15
SEE [114] - 3:5, 12:15,
12:25, 13:8, 16:22,
17:1, 20:9, 20:21,
22:25, 25:6, 28:12,
28:14, 30:25, 32:21,
34:2, 47:8, 48:9,
52:12, 53:25, 54:19,
54:20, 55:4, 55:10,
55:22, 55:24, 56:1,
57:2, 59:9, 59:21,
60:3, 62:4, 62:20,
62:21, 63:4, 63:18,
64:17, 66:1, 66:4,
66:8, 66:16, 67:23,
68:13, 68:19, 69:3,
70:9, 70:18, 70:19,
70:21, 70:24, 71:2,
71:22, 74:7, 76:3,
76:6, 76:9, 76:12,
76:17, 76:20, 78:6,
78:8, 79:14, 85:2,
86:15, 88:22, 93:4,
93:6, 93:17, 95:11,
96:19, 97:13, 97:17,
97:21, 98:3, 98:4,
99:1, 100:15,
102:25, 103:6,
103:10, 103:12,
103:15, 103:18,
106:1, 107:17,
113:13, 113:14,
113:17, 114:8,
115:15, 115:18,
115:22, 115:23,
116:22, 118:5,
118:9, 118:15,
118:18, 119:1,
119:24, 120:6,
121:21, 123:16,
123:19, 124:15,
125:3, 125:9,
132:12, 139:2,
142:17, 142:18,
163:11, 164:13
SEEING [10] - 7:3,
17:7, 17:22, 37:16,
49:12, 51:10, 51:13,
51:18, 59:12, 74:18
SEEK [4] - 74:15,
74:16, 74:22, 156:18
SEEKING [2] - 9:19,
10:1
SEEM [4] - 100:17,
105:20, 105:23,
139:14
SEEMED [1] - 140:2
SEEMS [5] - 45:13,
98:8, 132:14,
139:14, 143:16
SEEN [18] - 13:6,
29:14, 40:14, 56:8,
72:2, 72:11, 88:9,
89:2, 93:16, 98:16,
98:21, 98:25,
100:25, 101:16,
105:19, 105:21,
129:10, 134:25
SELECT [2] - 135:15,
143:17
SELECTED [4] - 95:8,
123:21, 123:23,
123:24
SELECTION [1] -
124:1
SELECTIONS [1] -
120:8
SELF [7] - 41:23,
66:20, 66:23, 67:6,
67:14, 111:19, 114:2
SELF-ASSESSMENT
[2] - 111:19, 114:2
SELF-REPORT [4] -
66:20, 66:23, 67:6,
67:14
SEND [4] - 37:13,
37:14, 50:9, 162:9
SENIOR [1] - 81:11
SENOGA [1] - 145:18
SENSE [9] - 40:17,
40:19, 41:6, 43:3,
46:4, 130:10,
130:11, 146:23,
150:24
SENSITIVE [1] - 150:7
SENTENCE [6] -
39:13, 96:23, 99:20,
107:7, 128:14, 135:8
SEPARATE [1] -
158:20
SEPTEMBER [14] -
29:3, 32:20, 36:5,
36:11, 36:21, 37:4,
87:24, 91:5, 104:5,
104:11, 105:15,
106:16, 106:17,
109:1
SEQUENCE [9] -
83:23, 89:1, 93:15,
94:23, 95:2, 95:4,
125:4, 125:14
SEQUENTIALLY [1] -
95:14
SERIES [1] - 85:1
SERIOUSLY [1] -
65:11
SEROTONIN [2] -
23:5, 31:24
SERVES [1] - 107:16
SERVICE [1] - 31:12
SERVICES [8] - 5:24,
28:11, 28:25, 29:4,
43:11, 64:10, 83:19
SESSION [2] - 86:4
SET [12] - 8:5, 88:20,
93:20, 131:9,
146:15, 147:15,
150:23, 151:3,
152:12, 152:16,
161:10, 161:19
SETS [1] - 8:1
SETTING [5] - 42:4,
42:5, 116:15,
116:18, 127:11
SEVEN [10] - 5:22,
13:22, 84:7, 84:9,
99:4, 101:10, 102:9,
155:20, 155:22,
156:14
SEVENTH [1] - 107:18
SEVERAL [8] - 9:22,
46:23, 60:5, 60:24,
60:25, 71:12,
116:14, 131:7
SEVERE [8] - 11:18,
14:15, 18:14, 19:2,
19:15, 21:6, 58:2,
58:21
SEVERITY [6] - 11:14,
12:13, 57:6, 59:1,
61:14, 72:8
SHAKES [2] - 16:23,
28:16
SHALL [3] - 147:13,
148:8, 153:4
SHARE [1] - 160:3
SHE [21] - 25:1, 25:2,
25:5, 25:8, 25:24,
26:1, 26:3, 31:13,
33:2, 36:12, 40:7,
41:1, 71:2, 110:3,
140:21, 140:22,
140:23, 140:24,
151:25
SHEET [1] - 147:18
SHIFT [2] - 15:20,
100:18
SHIP [1] - 150:11
SHIPS [1] - 149:7
SHOOTING [1] -
149:12
SHORT [5] - 28:22,
31:3, 35:19, 56:19,
139:18
SHORT-TERM [1] -
31:3
SHORTNESS [1] -
32:6
SHOULD [26] - 3:8,
13:14, 20:7, 36:18,
37:22, 37:24, 54:8,
71:9, 72:9, 83:21,
122:17, 145:8,
147:16, 147:17,
148:3, 148:5,
148:13, 152:14,
155:10, 156:16,

157:20, 158:5,
158:6, 160:18,
161:1, 161:18
SHOW [19] - 17:7,
20:7, 24:21, 25:15,
26:5, 26:20, 28:19,
29:1, 32:24, 36:9,
37:7, 39:14, 41:7,
58:5, 74:24, 96:12,
107:14, 108:4, 138:4
SHOWED [1] - 124:5
SHOWING [5] - 31:19,
66:14, 68:19, 90:6,
103:21
SHOWN [6] - 56:9,
58:10, 68:7, 85:16,
93:3, 123:2
SHOWS [12] - 24:23,
25:6, 27:17, 31:21,
32:12, 36:10, 41:9,
60:4, 60:15, 66:12,
101:18, 142:21
SHUT [1] - 163:5
SHUTS [1] - 3:18
SIC [1] - 58:6
SICK [1] - 31:2
SIDE [8] - 12:21, 23:7,
38:21, 77:14,
142:10, 148:24,
150:4, 160:7
SIGN [2] - 14:4, 37:16
SIGNATURE [1] -
36:10
SIGNED [4] - 36:11,
36:12, 36:15, 37:4
SIGNIFICANT [7] -
16:11, 21:4, 21:8,
22:9, 65:8, 121:2,
160:10
SIGNIFICANTLY [1] -
76:25
SIGNS [1] - 72:11
SILOS [1] - 44:16
SIMILAR [8] - 64:2,
84:19, 85:24, 97:22,
115:12, 116:15,
116:18, 120:15
SIMPLE [1] - 13:12
SIMULATOR [1] -
69:25
SIMULATORS [2] -
69:17, 69:23
SINCE [6] - 5:9, 5:21,
5:22, 56:9, 150:9,
150:22
SINGLE [1] - 119:20
SINGULAR [1] -
105:24
SIR [7] - 49:13, 52:13,
61:6, 72:13, 132:10,
146:8, 161:7
SIT [1] - 56:17
SITTING [2] - 114:4,
154:12
SITUATION [4] -
38:15, 39:10, 41:10,
46:10
SITUATIONS [2] -
42:20, 97:12
SIX [10] - 37:10, 37:23,
98:23, 99:6, 101:6,
108:5, 155:20,
155:21, 160:24,
160:25
SIXTH [1] - 107:18
SIZE [3] - 56:16,
57:10, 160:23
SIZEABLE [1] - 107:9
SKEPTICAL [1] -
158:3
SKILL [1] - 15:4
SKILLS [3] - 14:21,
14:23, 127:9
SKIM [1] - 139:20
SKIN [1] - 40:20
SKIP [2] - 142:14,
143:15
SLEEP [4] - 34:21,
65:3, 78:2, 162:12
SLEEPING [2] - 38:20,
78:4
SLIGHT [3] - 15:5,
68:6, 68:10
SLIGHTLY [1] -
154:10
SLOWS [1] - 140:19
SMALL [1] - 78:17
SMALLER [1] - 57:20
SO [324] - 3:8, 3:10,
3:18, 4:24, 5:8, 5:12,
5:19, 6:7, 6:23, 7:1,
7:5, 8:5, 8:7, 8:23,
9:12, 12:22, 12:25,
13:8, 13:16, 13:21,
14:7, 14:9, 14:11,
14:15, 15:3, 15:4,
17:8, 17:18, 17:22,
18:6, 18:17, 19:14,
20:6, 20:10, 20:15,
20:19, 21:8, 21:15,
21:21, 22:2, 22:4,
22:19, 22:20, 22:21,
22:23, 23:4, 23:8,
23:13, 24:4, 24:21,
25:12, 25:20, 25:24,
26:19, 27:9, 27:19,
29:22, 29:23, 30:14,
31:9, 31:12, 32:9,
32:21, 33:10, 33:16,
34:1, 34:3, 34:6,
34:14, 35:4, 35:17,
36:3, 36:9, 36:12,
36:16, 36:20, 38:6,
38:22, 39:6, 39:8,
39:20, 40:24, 41:1,
41:16, 41:24, 42:6,
42:23, 43:1, 43:3,
44:17, 46:1, 46:4,
47:8, 48:10, 48:12,
48:23, 49:10, 50:2,
50:14, 51:9, 51:12,
51:14, 52:6, 52:22,
53:9, 53:13, 53:19,
53:21, 54:7, 54:15,
54:19, 55:18, 55:24,
56:5, 56:11, 56:20,
57:5, 57:12, 57:18,
57:21, 58:22, 58:23,
59:2, 60:4, 60:9,
61:11, 63:17, 63:21,
64:1, 64:7, 64:13,
66:14, 66:19, 66:21,
67:3, 67:6, 67:14,
67:15, 67:17, 67:20,
68:15, 69:22, 69:24,
70:1, 70:9, 70:20,
74:8, 74:18, 75:10,
76:23, 77:3, 77:17,
77:25, 78:3, 78:19,
79:14, 79:19, 81:24,
82:23, 84:9, 84:11,
85:4, 85:6, 85:17,
86:1, 88:11, 88:21,
88:22, 90:5, 92:16,
93:3, 93:4, 94:4,
95:2, 95:11, 95:13,
96:4, 96:9, 96:10,
96:15, 96:18, 96:20,
97:2, 97:12, 97:21,
98:1, 98:2, 98:3,
98:4, 99:14, 99:17,
100:2, 102:7,
102:14, 102:21,
104:8, 104:10,
105:22, 106:14,
106:16, 106:21,
107:4, 107:11,
110:16, 111:13,
112:12, 112:16,
112:24, 113:2,
113:12, 115:5,
115:22, 117:13,
118:1, 119:8,
119:13, 120:6,
121:5, 121:23,
122:20, 124:8,
124:23, 126:1,
127:5, 127:10,
127:13, 127:15,
127:16, 128:15,
131:13, 132:6,
133:17, 133:22,
133:24, 134:17,
135:1, 136:6, 137:7,
137:8, 137:15,
137:21, 138:5,
138:8, 138:22,
139:12, 139:24,
140:2, 140:10,
140:11, 140:13,
140:19, 141:2,
141:4, 141:12,
142:9, 142:20,
143:7, 143:20,
144:3, 144:7,
144:10, 144:15,
145:2, 145:21,
146:4, 146:13,
146:16, 147:2,
147:19, 147:25,
148:17, 149:1,
149:16, 149:19,
149:20, 149:21,
150:3, 150:9,
150:12, 151:5,
151:8, 151:25,
153:8, 153:11,
154:5, 154:9,
154:20, 154:21,
155:13, 155:18,
155:23, 156:7,
156:9, 156:12,
156:21, 157:11,
158:3, 158:8,
159:10, 159:12,
159:20, 160:9,
160:16, 160:18,
160:21, 161:1,
161:10, 161:11,
161:17, 161:20,
162:4, 163:13,
163:19, 163:21,
163:25, 164:3, 164:5
SOCIAL [2] - 20:7,
62:23
SOCIETY [2] - 12:16,
63:15
SOCIOECONOMIC [1]
- 51:15
SOLELY [4] - 41:22,
42:6, 42:23, 53:11
SOME [44] - 6:18,
12:9, 15:14, 17:11,
28:6, 30:25, 31:15,
35:6, 41:12, 41:16,
46:4, 48:9, 52:23,
61:14, 61:16, 68:8,
68:25, 69:11, 74:11,
74:24, 75:1, 75:7,
75:12, 84:1, 96:7,
98:10, 102:7,
103:20, 105:3,
109:21, 111:2,
112:12, 113:1,
116:11, 136:18,
136:24, 138:4,
139:17, 142:5,
146:21, 153:14,
155:17, 157:18,
163:2
SOMEBODY [6] - 8:8,
12:7, 37:12, 42:12,
53:25, 59:12
SOMEONE [4] - 15:24,
50:19, 81:15, 103:18
SOMEONE'S [1] -
151:16
SOMETHING [29] -
6:24, 8:24, 9:12,
14:10, 17:9, 18:4,
25:1, 32:3, 37:17,
57:10, 109:24,
110:1, 132:12,
132:13, 137:24,
143:5, 146:24,
147:8, 147:21,
153:15, 155:2,
155:23, 156:4,
156:12, 156:15,
158:21, 160:22,
161:23, 161:25
SOMETIMES [9] -
13:25, 32:2, 72:22,
110:22, 141:25,
148:25, 149:5,
149:14, 156:10
SOMEWHAT [2] -
34:14, 156:22
SOMEWHERE [1] -
49:14
SORRY [38] - 28:23,
34:25, 35:11, 35:13,
36:24, 53:19, 58:9,
58:12, 58:13, 61:22,
61:25, 68:25, 74:4,
74:5, 78:8, 92:3,
92:4, 107:1, 111:12,
111:13, 112:1,
112:14, 113:11,
115:6, 116:21,
116:23, 118:5,
118:12, 119:1,
119:25, 123:7,
125:14, 127:20,
134:3, 135:9, 145:7,
152:3
SORT [25] - 6:9, 6:20,
14:3, 15:23, 16:11,
17:10, 17:23, 19:24,
21:6, 21:18, 21:19,
23:7, 26:3, 33:24,

36:3, 43:5, 51:14,
52:23, 74:11, 74:12,
95:14, 105:1,
133:14, 153:10
SOUGHT [1] - 156:19
SOUND [2] - 139:22,
139:23
SOUNDS [2] - 31:4,
163:3
SOURCE [1] - 43:18
SPACE [2] - 151:6,
157:23
SPAN [1] - 61:13
SPEAK [1] - 120:20
SPEAKING [2] -
85:23, 157:9
SPEAKS [2] - 27:1,
139:25
SPECIALIZES [1] -
81:16
SPECIALTIES [1] -
5:11
SPECIALTY [1] - 9:12
SPECIFIC [11] - 15:15,
16:6, 40:19, 72:5,
72:9, 85:14, 95:8,
105:22, 122:25,
129:13, 130:24
SPECIFICALLY [12] -
15:16, 26:1, 32:11,
41:4, 41:13, 47:11,
60:17, 60:22, 69:14,
111:25, 122:20,
123:11
SPECIFICITY [2] -
17:21, 17:25
SPECIFICS [3] -
18:18, 72:10, 86:6
SPECULATION [1] -
121:4
SPEED [2] - 131:16,
131:19
SPEEDED [1] - 97:12
SPELL [2] - 4:16,
80:19
SPEND [4] - 93:25,
95:18, 131:11,
139:15
SPENDING [1] - 121:9
SPENT [16] - 89:4,
95:9, 97:15, 97:22,
98:10, 100:16,
101:20, 101:22,
117:13, 124:20,
124:23, 125:8,
125:11, 125:16,
132:4, 135:5
SPIRIT [1] - 132:25
SPLITTING [1] - 159:5
SPOKE [4] - 53:9,
110:20, 120:19,
143:25
SPORTING [1] - 11:6
SPOT [1] - 35:16
SPOUSE [1] - 68:22
SPREAD [1] - 142:1
SSRI'S [1] - 13:1
STABLE [2] - 15:7,
59:22
STAGE [1] - 157:15
STAMPS [1] - 147:7
STAND [8] - 6:1, 6:11,
136:19, 136:24,
137:10, 141:14,
141:15, 141:16
STANDALONE [1] -
15:18
STANDARD [8] - 24:8,
67:3, 69:21, 99:1,
127:11, 127:12,
134:21, 159:15
STANDARDIZATION
[3] - 131:14, 133:13,
133:16
STANDARDIZED [2] -
9:20, 114:4
STANDARDIZING [1]
- 133:17
STANDARDS [1] -
6:22
STANDPOINT [4] -
10:23, 11:5, 72:24
START [13] - 14:19,
80:1, 93:11, 93:22,
94:17, 102:18,
107:3, 133:3,
133:14, 137:18,
140:15, 140:25,
155:22
STARTED [2] - 12:17,
93:23
STARTING [4] - 30:25,
82:15, 93:13, 128:15
STARTS [2] - 3:8,
97:18
STATE [12] - 4:15,
5:23, 29:16, 45:22,
47:5, 47:22, 48:14,
80:18, 83:16, 83:17,
83:25, 111:8
STATED [1] - 143:2
STATEMENT [14] -
16:6, 18:2, 18:6,
18:20, 18:21, 18:22,
29:24, 59:23, 71:6,
71:25, 97:9, 100:5,
104:7, 124:8
STATEMENTS [2] -
18:10, 141:15
STATES [8] - 1:1, 1:6,
26:1, 46:23, 47:20,
48:3, 71:2, 114:1
STATIC [1] - 14:9
STATISTICAL [5] -
8:2, 67:2, 69:20,
81:16, 105:6
STATUS [2] - 36:21,
37:1
STAY [2] - 163:23
STENOTYPE [1] -
1:22
STENOTYPE-
COMPUTER [1] -
1:22
STEP [84] - 13:18,
15:22, 28:4, 66:15,
82:13, 82:14, 82:22,
83:1, 83:2, 83:6,
83:7, 83:9, 83:12,
83:13, 84:3, 84:6,
84:7, 84:13, 84:18,
84:19, 85:14, 85:25,
86:13, 86:16, 87:2,
87:13, 87:24, 90:8,
90:19, 91:5, 91:16,
92:2, 92:7, 94:21,
96:6, 96:16, 96:22,
97:6, 99:15, 99:22,
100:4, 102:1, 104:5,
105:15, 106:8,
106:10, 106:11,
106:12, 106:13,
106:14, 106:17,
106:21, 107:5,
107:12, 107:24,
108:10, 108:14,
108:20, 109:1,
110:21, 111:25,
112:1, 112:4, 114:1,
114:3, 115:3, 115:4,
115:8, 115:12,
116:12, 116:16,
116:18, 120:3,
120:23, 128:19,
128:23, 128:25,
129:5, 130:1,
132:17, 134:14
STEPS [1] - 21:21
STICK [1] - 138:24
STIGMA [1] - 73:23
STILL [9] - 34:24,
68:19, 97:21, 99:1,
100:15, 102:11,
137:15, 141:15,
153:17
STIMULANT [3] -
24:5, 77:9, 77:11
STIMULANTS [2] -
26:16, 74:20
STIMULATING [3] -
75:7, 75:11, 75:14
STIMULATION [1] -
6:5
STIMULI [1] - 68:9
STIPULATE [2] -
89:11, 89:13
STIPULATING [1] -
75:10
STOMACH [1] - 77:19
STOP [7] - 3:7, 34:18,
69:2, 80:2, 102:19,
102:20, 157:2
STOPPED [2] - 31:23,
38:15
STORED [1] - 15:4
STRATEGIES [1] -
96:21
STRATEGY [5] -
107:7, 124:12,
124:13, 143:8, 144:1
STREET [2] - 1:19, 2:3
STRESS [6] - 11:2,
31:1, 31:2, 33:16,
34:22, 42:20
STRESSED [2] - 35:5,
41:9
STRESSORS [3] -
14:14, 39:10, 63:25
STRIKE [2] - 106:18,
152:9
STRONGLY [1] -
74:10
STRUCTURE [1] -
84:19
STRUCTURED [1] -
152:13
STUDENT [3] - 74:19,
116:17, 134:21
STUDENTS [16] -
73:24, 74:21, 75:3,
82:12, 82:20, 82:25,
110:20, 110:22,
110:24, 110:25,
111:2, 111:6,
120:20, 120:21,
129:8, 138:8
STUDY [1] - 131:22
STUDYING [1] - 33:13
STUFF [2] - 103:24,
161:15
SUBHEADING [2] -
52:14, 62:4
SUBJECTED [2] -
62:22, 64:11
SUBJECTIVE [11] -
26:15, 32:4, 35:4,
41:16, 42:7, 42:13,
42:21, 67:16, 67:18,
74:8, 75:2
SUBJECTIVELY [1] -
26:17
SUBMISSION [1] -
22:4
SUBMIT [2] - 89:23,
145:8
SUBMITTED [4] -
10:2, 16:19, 21:25,
27:21
SUBQUESTIONS [1] -
141:20
SUBSCRIPTION [2] -
138:9, 138:10
SUBSEQUENT [1] -
129:5
SUBSPECIALTY [2] -
5:16, 6:8
SUBSTANTIAL [2] -
27:24, 41:7
SUBSTANTIALLY [4]
- 16:14, 42:11,
44:19, 153:20
SUBSTANTIATED [1]
- 44:22
SUBSTANTIATES [1]
- 35:9
SUCH [7] - 7:23, 9:23,
34:10, 49:4, 138:6,
143:12, 144:1
SUFFICIENT [5] -
13:18, 26:20, 42:10,
105:7, 158:18
SUGGEST [2] - 21:19,
34:9
SUGGESTED [1] -
144:4
SUGGESTING [1] -
141:22
SUGGESTION [1] -
141:12
SUGGESTS [4] -
34:12, 38:22, 41:11,
101:19
SUICIDAL [1] - 35:1
SUITE [1] - 2:3
SUM [1] - 105:4
SUMMARY [1] - 31:17
SUMMERTIME [1] -
150:6
SUPERVISES [1] -
37:12
SUPPLEMENTAL [1] -
131:1
SUPPORT [8] - 10:3,
15:18, 21:12, 22:14,
22:23, 27:21, 28:2
SUPPOSE [5] - 131:6,
131:20, 157:15,
157:16, 157:17
SUPPOSED [2] - 34:2,
138:12

SUPPRESSING ^[1] - 77:16
SUR ^[2] - 151:21, 152:6
SUR-REPLY ^[2] - 151:21, 152:6
SURE ^[43] - 8:23, 10:13, 26:24, 29:13, 47:20, 50:1, 52:6, 54:5, 56:17, 56:21, 64:22, 75:23, 77:25, 78:20, 88:25, 94:21, 97:1, 99:25, 100:7, 102:5, 111:7, 113:23, 114:21, 116:5, 128:3, 128:17, 131:7, 133:17, 138:14, 139:6, 146:21, 146:22, 147:2, 152:14, 152:20, 153:14, 158:19, 159:12, 161:21, 163:1, 163:23
SURGEONS ^[1] - 9:11
SURPRISE ^[2] - 145:12, 145:20
SUSTAINED ^[1] - 38:20
SWEAR ^[2] - 4:9, 80:12
SWEATING ^[1] - 32:6
SWEEP ^[1] - 157:24
SWORN ^[3] - 4:14, 80:17, 137:14
SYMPTOM ^[9] - 11:1, 11:11, 11:14, 16:4, 19:21, 21:3, 22:5, 32:11, 33:18
SYMPTOMS ^[53] - 8:10, 8:16, 11:17, 12:6, 12:8, 12:9, 16:3, 16:6, 18:7, 18:13, 18:14, 18:15, 18:17, 19:8, 21:10, 22:18, 22:21, 24:11, 25:10, 25:25, 31:1, 31:5, 32:5, 33:17, 33:19, 35:8, 38:16, 38:18, 38:22, 39:11, 39:23, 40:15, 40:19, 40:24, 41:2, 41:12, 41:15, 41:17, 42:10, 42:16, 61:16, 61:18, 63:19, 65:1, 66:21, 71:3, 72:3, 72:6, 72:11, 141:1
SYNAPSES ^[1] - 75:6
SYSTEM ^[6] - 14:3, 23:11, 23:24, 55:11, 70:7, 152:22
SYSTEMS ^[2] - 70:6, 85:12

T

TABLE ^[6] - 85:24, 93:4, 93:12, 132:3
TABLET ^[1] - 58:5
TAKE ^[45] - 3:10, 7:21, 23:10, 31:24, 32:3, 33:21, 35:17, 38:1, 38:19, 41:20, 54:9, 60:9, 74:25, 75:4, 77:24, 78:1, 79:23, 79:25, 82:12, 82:23, 82:25, 83:12, 95:6, 95:23, 99:12, 102:21, 113:4, 115:4, 125:6, 125:23, 127:25, 129:3, 129:25, 132:17, 136:19, 136:24, 139:10, 140:24, 148:22, 156:19, 160:1, 160:17, 160:18, 161:2, 161:18
TAKEN ^[22] - 23:16, 23:18, 23:20, 23:22, 35:19, 77:25, 80:4, 82:15, 83:2, 83:8, 83:9, 83:13, 85:25, 87:2, 93:21, 103:1, 114:2, 115:12, 116:15, 117:14, 128:20, 146:25
TAKER ^[7] - 115:7, 121:1, 121:8, 126:3, 126:8, 130:25, 131:17
TAKES ^[5] - 12:19, 46:14, 65:1, 74:6, 146:15
TAKING ^[30] - 19:8, 19:9, 19:10, 22:3, 23:24, 26:9, 27:25, 38:15, 38:18, 41:4, 42:8, 42:20, 44:20, 59:13, 73:21, 74:3, 76:23, 82:17, 82:21, 111:25, 115:7, 126:14, 126:15, 128:22, 134:6, 135:11, 143:8, 153:22, 162:3, 162:19
TALK ^[6] - 11:7, 21:5, 85:3, 86:6, 146:10, 149:23
TALKED ^[10] - 19:3, 20:19, 22:4, 31:23, 44:11, 46:6, 70:20, 125:22, 147:3, 161:9
TALKING ^[16] - 8:9, 8:10, 19:23, 42:24, 70:21, 72:5, 76:2, 96:15, 106:10, 106:11, 113:11, 121:14, 121:23, 122:20, 150:10, 150:19
TALKS ^[2] - 31:1, 72:8
TARGETED ^[1] - 149:18
TASKS ^[2] - 33:23, 34:13
TEACH ^[4] - 9:3, 9:17, 139:8, 140:7
TEACHING ^[1] - 7:3
TEAM ^[1] - 162:20
TEAMS ^[2] - 1:9, 3:15
TEARFULNESS ^[1] - 40:23
TECH ^[1] - 50:10
TECHNICALLY ^[1] - 148:15
TECHNIQUE ^[1] - 140:7
TECHNIQUES ^[1] - 81:17
TELEHEALTH ^[1] - 14:4
TELEMEDICINE ^[1] - 51:13
TELL ^[23] - 11:23, 18:23, 19:7, 21:9, 23:3, 24:10, 27:8, 27:16, 32:14, 33:7, 33:24, 35:3, 36:22, 37:1, 38:12, 39:5, 40:11, 69:2, 89:18, 124:22, 138:17, 155:17, 156:12
TELLING ^[1] - 85:17
TELLS ^[5] - 3:16, 27:9, 29:18, 30:18, 53:25
TEMPORARY ^[1] - 12:11
TEN ^[9] - 52:1, 52:2, 74:18, 97:21, 107:21, 111:7, 125:14, 125:15, 162:16
TEND ^[4] - 49:16, 63:7, 63:19, 102:16
TENDS ^[2] - 51:5, 75:7
TENNESSEE ^[2] - 5:10, 46:25
TENSION ^[1] - 65:2
TERM ^[4] - 14:14, 14:17, 24:24, 31:3
TERMINATED ^[1] - 94:11
TERMS ^[6] - 6:22, 81:24, 86:5, 89:1, 124:9, 127:7
TEST ^[54] - 9:22, 15:10, 17:1, 17:14, 19:2, 19:8, 19:10, 19:15, 20:20, 41:4, 42:20, 49:23, 50:8, 50:17, 50:22, 51:1, 67:19, 68:2, 68:4, 82:7, 82:8, 86:2, 88:11, 89:16, 92:18, 94:21, 95:17, 95:18, 107:15, 115:7, 117:9, 121:1, 121:8, 126:3, 126:7, 126:13, 126:15, 127:11, 130:12, 130:14, 130:20, 130:25, 131:17, 138:7, 139:4, 139:7, 141:8, 143:8, 144:7, 155:12, 156:5, 157:17
TESTIFIED ^[13] - 26:11, 45:18, 45:21, 45:22, 45:24, 46:7, 72:2, 73:20, 109:13, 110:19, 117:8, 120:16, 120:19
TESTIFY ^[2] - 46:8, 46:10
TESTIFYING ^[1] - 18:25
TESTIMONIES ^[1] - 46:2
TESTIMONY ^[20] - 10:20, 44:7, 46:2, 53:18, 70:5, 73:16, 96:7, 99:17, 105:17, 125:21, 131:25, 136:20, 136:25, 137:14, 137:16, 141:22, 142:3, 143:20, 143:23, 146:3
TESTING ^[32] - 10:2, 10:3, 15:21, 15:24, 16:8, 18:8, 19:24, 19:25, 20:2, 20:13, 21:13, 21:14, 22:15, 22:16, 26:19, 28:3, 39:22, 42:3, 49:21, 49:25, 50:11, 50:13, 86:10, 88:14, 92:21, 114:4, 126:2, 128:24, 131:16, 134:19, 154:5, 154:25
TESTS ^[7] - 9:20, 19:9, 49:22, 50:3, 50:8, 74:12, 139:25
TEXT ^[1] - 8:3
THAN ^[27] - 8:23, 11:12, 11:18, 12:16, 21:10, 22:3, 46:3, 52:1, 52:2, 54:9, 57:19, 59:21, 59:24, 63:9, 63:13, 69:25, 83:12, 83:22, 106:2, 128:25, 129:12, 130:19, 145:25, 147:12, 158:22, 161:1, 161:2
THANK ^[57] - 4:4, 29:10, 45:12, 51:19, 52:17, 55:13, 56:4, 59:8, 61:3, 62:3, 62:17, 62:25, 64:4, 65:15, 65:23, 65:25, 67:20, 70:11, 71:16, 72:14, 76:22, 79:11, 79:13, 80:3, 80:7, 82:10, 93:5, 102:24, 104:1, 105:11, 109:6, 110:7, 110:14, 113:7, 114:6, 114:17, 115:13, 118:4, 118:8, 118:25, 119:22, 120:6, 122:12, 123:9, 125:19, 127:19, 135:20, 135:22, 144:21, 162:6, 164:5, 164:6, 164:7, 164:15, 164:16, 164:17, 164:18
THANKS ^[1] - 128:12
THAT ^[733] - 3:6, 3:7, 3:14, 3:16, 4:2, 6:10, 6:12, 6:20, 6:23, 6:24, 7:5, 7:9, 7:21, 8:1, 8:4, 8:6, 8:24, 9:1, 9:25, 10:1, 10:14, 10:25, 11:2, 11:14, 11:17, 12:1, 12:8, 12:11, 12:12, 12:15, 12:17, 13:10, 13:13, 13:22, 13:23, 13:24, 14:10, 14:25, 15:4, 15:5, 15:17, 16:6, 16:10, 16:11, 16:13, 16:14, 16:17, 16:18, 17:5, 17:13, 17:25, 18:6, 18:15,

19:4, 19:11, 19:16,
 19:18, 19:21, 20:9,
 20:11, 20:13, 20:22,
 21:5, 21:7, 21:10,
 21:11, 21:20, 21:25,
 22:3, 22:4, 22:7,
 22:9, 22:23, 23:5,
 23:9, 23:16, 23:22,
 24:3, 24:8, 24:9,
 24:21, 24:23, 24:24,
 25:1, 25:2, 25:4,
 25:6, 25:15, 25:21,
 26:1, 26:2, 26:5,
 26:14, 26:16, 26:18,
 26:20, 26:25, 27:8,
 27:9, 27:13, 27:17,
 27:20, 27:23, 28:7,
 28:22, 29:18, 30:18,
 30:23, 31:3, 31:11,
 31:14, 31:16, 31:21,
 31:23, 31:24, 32:2,
 32:7, 32:12, 32:18,
 33:5, 33:8, 33:12,
 33:13, 33:14, 33:18,
 33:21, 33:24, 34:11,
 34:14, 35:5, 35:9,
 35:25, 36:13, 36:14,
 36:22, 37:1, 37:2,
 37:8, 37:17, 37:19,
 37:20, 37:22, 37:24,
 38:14, 38:15, 38:17,
 38:19, 38:22, 39:7,
 39:8, 39:9, 39:21,
 40:24, 41:1, 41:9,
 41:11, 41:14, 41:17,
 41:19, 41:25, 42:9,
 42:10, 42:13, 42:14,
 44:3, 44:18, 44:22,
 44:24, 45:16, 46:5,
 46:6, 46:7, 46:9,
 46:10, 46:14, 46:22,
 46:23, 47:15, 47:22,
 47:25, 48:2, 48:3,
 48:5, 48:14, 49:3,
 49:14, 49:16, 50:1,
 50:10, 50:13, 50:23,
 50:24, 50:25, 51:2,
 51:13, 51:23, 52:3,
 52:18, 52:23, 53:7,
 53:10, 53:23, 54:2,
 54:4, 55:5, 55:8,
 55:9, 55:10, 55:22,
 56:6, 56:8, 56:9,
 56:10, 56:11, 56:14,
 57:6, 57:8, 57:9,
 57:14, 57:23, 57:25,
 58:1, 58:10, 58:18,
 58:19, 58:20, 58:25,
 59:2, 59:3, 59:4,
 59:18, 59:19, 60:4,
 60:12, 60:15, 60:16,
 60:19, 60:20, 60:22,
 60:23, 61:1, 61:7,
 61:10, 61:12, 62:20,
 63:5, 63:12, 63:15,
 63:16, 63:18, 64:7,
 64:9, 64:11, 64:12,
 64:13, 65:9, 66:8,
 67:5, 67:17, 67:19,
 68:18, 68:20, 68:21,
 68:25, 69:6, 69:11,
 69:13, 69:14, 69:16,
 70:2, 70:6, 70:9,
 70:13, 70:19, 71:3,
 71:6, 71:8, 71:11,
 71:16, 72:2, 72:11,
 72:19, 72:20, 72:25,
 73:3, 73:9, 73:13,
 73:20, 73:23, 74:1,
 74:9, 74:11, 74:12,
 74:16, 74:20, 74:25,
 76:17, 76:23, 76:24,
 77:3, 77:5, 77:8,
 78:3, 81:19, 82:21,
 82:24, 83:4, 83:18,
 83:21, 84:16, 84:24,
 85:12, 85:15, 85:24,
 86:9, 86:16, 88:9,
 89:2, 89:3, 89:5,
 89:9, 89:11, 89:13,
 89:14, 89:15, 89:16,
 89:19, 89:20, 89:23,
 90:5, 92:18, 93:3,
 93:4, 93:23, 93:24,
 94:1, 94:4, 94:6,
 94:11, 94:12, 94:13,
 94:15, 94:24, 95:1,
 95:3, 95:4, 95:8,
 95:10, 95:14, 95:24,
 95:25, 96:7, 96:21,
 97:4, 97:5, 97:8,
 97:11, 97:14, 97:23,
 97:25, 98:15, 100:5,
 100:7, 100:13,
 101:18, 102:3,
 102:8, 102:11,
 103:17, 103:19,
 103:21, 104:16,
 104:20, 105:2,
 105:9, 105:17,
 105:23, 106:2,
 106:13, 106:18,
 108:4, 109:14,
 109:21, 109:22,
 109:25, 110:1,
 110:2, 110:6, 110:9,
 110:18, 110:19,
 111:14, 111:20,
 111:23, 111:24,
 112:7, 112:10,
 112:12, 112:14,
 112:15, 112:16,
 112:17, 112:19,
 113:13, 114:3,
 114:8, 114:11,
 115:6, 115:8,
 115:11, 115:16,
 115:19, 115:24,
 116:9, 116:10,
 116:11, 116:14,
 116:17, 117:4,
 117:6, 117:8,
 117:10, 117:19,
 117:22, 118:16,
 118:18, 118:21,
 119:15, 119:16,
 119:19, 119:23,
 119:25, 120:7,
 120:10, 120:11,
 120:14, 120:16,
 120:19, 120:20,
 120:22, 120:24,
 121:4, 121:5, 121:6,
 121:8, 121:17,
 121:20, 121:24,
 122:3, 122:6,
 122:23, 122:24,
 122:25, 123:2,
 123:14, 123:19,
 123:22, 123:23,
 124:5, 124:9,
 124:12, 124:15,
 124:16, 124:21,
 125:16, 125:17,
 125:23, 126:1,
 127:8, 127:10,
 127:16, 127:19,
 128:14, 128:25,
 129:9, 129:18,
 130:16, 130:17,
 130:24, 131:12,
 131:14, 131:22,
 131:24, 132:9,
 132:13, 133:20,
 133:22, 133:24,
 134:1, 134:2,
 134:17, 135:4,
 135:6, 135:8,
 135:13, 135:14,
 135:15, 135:20,
 135:23, 136:12,
 136:13, 136:17,
 136:22, 136:23,
 136:25, 137:2,
 137:5, 137:10,
 137:11, 137:22,
 137:23, 137:24,
 137:25, 138:3,
 138:5, 138:7, 138:9,
 138:11, 138:14,
 138:15, 138:16,
 138:17, 138:22,
 139:1, 139:3, 139:5,
 139:6, 139:7, 139:8,
 139:12, 139:19,
 139:21, 139:24,
 139:25, 140:2,
 140:4, 140:8,
 140:10, 140:11,
 140:17, 140:22,
 140:25, 141:5,
 141:16, 141:23,
 141:25, 142:4,
 142:5, 142:6, 142:8,
 142:9, 142:14,
 142:15, 142:18,
 142:19, 142:21,
 142:22, 142:25,
 143:14, 143:15,
 143:22, 144:1,
 144:2, 144:3, 144:4,
 144:5, 144:9,
 144:12, 144:15,
 144:23, 145:7,
 145:9, 145:12,
 145:13, 145:19,
 145:23, 145:25,
 146:15, 146:16,
 146:18, 146:19,
 147:2, 147:8,
 147:10, 147:13,
 147:16, 147:19,
 147:22, 147:23,
 147:24, 148:7,
 148:12, 148:13,
 149:6, 149:18,
 149:19, 149:25,
 151:2, 151:9,
 151:10, 151:18,
 151:23, 151:25,
 152:1, 152:15,
 152:16, 152:17,
 152:20, 152:21,
 153:11, 153:20,
 153:21, 153:24,
 154:3, 154:5, 154:6,
 154:20, 154:22,
 155:3, 155:13,
 155:18, 156:8,
 156:13, 156:23,
 157:7, 157:8, 157:9,
 157:14, 157:20,
 157:22, 157:24,
 158:6, 158:8,
 158:11, 158:16,
 158:18, 158:21,
 158:25, 159:5,
 159:8, 159:22,
 160:2, 160:13,
 160:16, 161:1,
 161:2, 161:12,
 161:13, 161:17,
 161:18, 161:20,
 161:21, 161:23,
 161:24, 161:25,
 162:4, 162:5, 162:7,
 163:6, 163:7,
 163:22, 163:24,
 163:25, 164:1,
 164:2, 164:20
THAT'S [74] - 3:19,
 5:5, 8:20, 9:8, 9:12,
 13:22, 14:16, 14:19,
 18:9, 19:6, 19:18,
 19:19, 20:20, 23:14,
 31:4, 31:10, 35:15,
 37:14, 38:4, 41:10,
 46:12, 49:7, 50:4,
 50:16, 51:17, 51:22,
 52:5, 54:10, 56:10,
 56:22, 58:16, 62:21,
 63:14, 68:19, 73:10,
 74:17, 76:7, 76:16,
 76:21, 79:20, 84:9,
 95:2, 100:15,
 101:18, 110:4,
 117:11, 117:25,
 118:15, 122:2,
 126:22, 127:21,
 140:24, 141:3,
 141:6, 141:19,
 144:10, 145:3,
 145:21, 146:5,
 146:13, 147:18,
 147:25, 148:19,
 149:2, 152:21,
 155:4, 156:3, 157:1,
 161:5, 162:9,
 163:18, 164:3
THE [1465] - 1:1, 1:2,
 1:11, 2:4, 3:2, 3:5,
 3:13, 3:22, 4:2, 4:5,
 4:7, 4:8, 4:9, 4:10,
 4:11, 4:15, 4:16,
 4:17, 4:24, 5:5, 5:13,
 5:16, 5:20, 5:23,
 6:18, 6:22, 7:3, 7:4,
 7:5, 7:7, 7:8, 7:9,
 7:17, 8:2, 8:4, 8:5,
 8:10, 8:11, 8:15,
 8:16, 10:1, 10:8,
 10:9, 10:10, 10:15,
 10:16, 10:17, 10:20,
 11:1, 11:10, 11:11,
 11:14, 11:15, 11:20,
 12:1, 12:10, 12:13,
 12:15, 12:18, 12:20,
 12:22, 12:23, 13:2,
 13:4, 13:8, 13:13,
 13:15, 13:18, 13:21,
 14:1, 14:3, 14:5,
 14:13, 14:21, 14:22,
 15:3, 15:4, 15:7,
 15:11, 15:12, 15:14,
 15:17, 15:21, 15:22,

16:3, 16:5, 16:7,	46:11, 46:19, 47:4,	75:3, 75:5, 75:6,	95:8, 95:9, 95:12,	110:2, 110:5, 110:7,
16:9, 16:14, 16:24,	47:8, 47:10, 47:16,	75:7, 75:9, 75:19,	95:17, 95:21, 95:24,	110:9, 111:3, 111:5,
17:1, 17:14, 17:16,	47:25, 48:7, 48:12,	76:6, 76:7, 76:11,	96:2, 96:5, 96:6,	111:10, 111:11,
17:21, 17:22, 17:25,	48:18, 48:22, 48:23,	77:16, 77:17, 77:19,	96:19, 96:23, 96:24,	111:13, 111:16,
18:1, 18:2, 18:7,	49:3, 49:4, 49:6,	77:22, 77:25, 78:10,	97:1, 97:4, 97:6,	111:17, 111:18,
18:8, 18:9, 18:17,	49:9, 49:10, 50:9,	78:13, 78:16, 78:18,	97:8, 97:10, 97:13,	111:22, 111:24,
18:18, 18:19, 18:20,	50:10, 50:11, 50:13,	78:22, 78:25, 79:1,	97:14, 97:15, 97:17,	111:25, 112:1,
19:7, 19:8, 19:11,	50:14, 50:15, 50:17,	79:4, 79:11, 79:13,	97:18, 97:20, 97:23,	112:3, 112:5, 112:7,
19:13, 19:14, 19:19,	50:19, 50:21, 50:25,	79:14, 79:17, 79:18,	98:3, 98:6, 98:8,	112:9, 112:10,
19:24, 19:25, 20:1,	51:5, 51:7, 51:10,	79:21, 79:25, 80:1,	98:9, 98:10, 98:11,	112:11, 112:14,
20:2, 20:9, 20:10,	51:11, 51:20, 52:8,	80:5, 80:8, 80:10,	98:12, 98:14, 98:15,	112:17, 112:18,
20:17, 20:20, 20:21,	52:14, 53:2, 53:3,	80:11, 80:12, 80:13,	98:17, 98:25, 99:1,	112:19, 113:9,
20:24, 21:6, 21:10,	53:6, 53:11, 53:17,	80:14, 80:18, 80:19,	99:3, 99:14, 99:15,	113:13, 113:14,
21:24, 22:4, 22:8,	53:19, 53:20, 53:21,	80:20, 81:2, 81:7,	99:20, 99:21, 99:25,	113:15, 113:17,
22:11, 22:25, 23:4,	53:22, 54:5, 54:9,	81:8, 81:10, 81:12,	100:3, 100:5, 100:7,	113:22, 113:25,
23:15, 23:23, 24:2,	54:10, 54:11, 54:19,	81:16, 81:17, 81:19,	100:10, 100:12,	114:2, 114:15,
24:4, 24:11, 24:12,	54:20, 54:21, 55:1,	82:3, 82:4, 82:6,	100:14, 100:15,	114:19, 114:23,
24:14, 24:18, 25:11,	55:2, 55:4, 55:9,	82:9, 82:11, 82:13,	100:16, 100:17,	114:24, 115:1,
25:14, 25:17, 25:18,	55:10, 55:19, 55:20,	82:15, 82:16, 82:17,	100:20, 100:24,	115:3, 115:9,
25:23, 26:8, 26:9,	55:22, 55:25, 56:2,	82:20, 82:21, 82:22,	101:3, 101:4, 101:7,	115:10, 115:11,
26:21, 26:22, 27:3,	56:3, 56:11, 56:15,	82:25, 83:2, 83:3,	101:8, 101:11,	115:12, 115:15,
27:4, 27:5, 27:6,	56:16, 56:18, 56:19,	83:4, 83:10, 83:15,	101:12, 101:15,	115:16, 115:18,
27:9, 27:12, 27:17,	56:21, 56:22, 56:24,	83:16, 83:17, 83:19,	101:16, 101:18,	115:22, 115:23,
27:18, 27:20, 27:25,	57:6, 57:7, 57:10,	83:23, 83:25, 84:4,	101:19, 101:20,	115:24, 115:25,
28:2, 28:3, 28:12,	57:11, 57:14, 57:25,	84:6, 84:10, 84:13,	101:21, 101:23,	116:3, 116:5,
28:13, 28:17, 29:9,	58:4, 58:8, 58:9,	84:16, 84:18, 84:19,	101:25, 102:5,	116:12, 116:16,
29:15, 29:20, 29:23,	58:10, 58:13, 58:17,	84:22, 84:23, 84:24,	102:10, 102:14,	116:17, 116:18,
29:25, 30:3, 30:7,	58:19, 59:1, 59:2,	85:10, 85:11, 85:13,	102:20, 102:25,	116:23, 116:24,
30:15, 30:16, 30:18,	59:4, 59:5, 59:21,	85:15, 85:16, 85:19,	103:2, 103:5, 103:6,	117:7, 117:8, 117:9,
30:24, 31:5, 31:8,	60:1, 60:9, 60:10,	85:20, 85:21, 85:23,	103:11, 103:13,	117:13, 117:14,
31:9, 31:19, 31:22,	60:16, 60:17, 60:18,	85:24, 85:25, 86:1,	103:14, 103:16,	117:15, 117:16,
32:3, 32:5, 32:11,	61:14, 61:15, 61:18,	86:2, 86:3, 86:4,	103:25, 104:4,	117:17, 117:18,
32:16, 32:22, 33:3,	61:24, 62:4, 62:7,	86:5, 86:6, 86:10,	104:13, 104:15,	117:19, 117:22,
33:4, 33:10, 33:11,	62:11, 62:13, 62:14,	86:12, 86:15, 86:21,	104:16, 104:17,	117:25, 118:1,
33:22, 33:25, 34:1,	62:15, 62:16, 62:18,	87:1, 87:5, 87:7,	104:18, 105:1,	118:11, 118:15,
34:2, 34:5, 34:7,	62:19, 63:2, 63:5,	87:12, 87:16, 87:18,	105:4, 105:5,	118:18, 118:20,
34:10, 34:11, 34:15,	63:7, 63:22, 64:13,	87:23, 88:2, 88:4,	105:14, 105:16,	118:21, 118:22,
34:16, 34:17, 34:18,	64:14, 64:15, 64:20,	88:8, 88:14, 88:16,	105:18, 105:19,	119:4, 119:8,
34:24, 35:1, 35:4,	64:23, 64:25, 65:1,	88:17, 88:22, 88:23,	105:20, 105:22,	119:12, 119:17,
35:7, 35:11, 35:14,	65:4, 65:5, 65:8,	88:25, 89:1, 89:3,	105:23, 106:1,	119:19, 119:24,
35:15, 35:20, 35:22,	65:13, 65:17, 65:19,	89:4, 89:6, 89:21,	106:2, 106:4, 106:5,	120:5, 120:7,
35:23, 36:1, 36:3,	66:2, 66:4, 66:13,	89:23, 90:7, 90:11,	106:8, 106:9,	120:15, 120:17,
36:4, 36:5, 36:7,	66:14, 66:15, 66:19,	90:13, 90:18, 90:22,	106:11, 106:12,	121:5, 121:6, 121:9,
36:8, 36:11, 36:16,	66:25, 67:9, 67:13,	90:24, 91:4, 91:8,	106:13, 106:14,	121:15, 121:17,
36:19, 36:24, 36:25,	67:14, 67:15, 67:22,	91:10, 91:15, 91:19,	106:16, 106:17,	121:21, 121:22,
37:3, 37:8, 37:11,	67:23, 67:24, 68:1,	91:21, 92:1, 92:3,	106:20, 106:24,	121:23, 121:24,
37:12, 37:18, 37:20,	68:4, 68:5, 68:6,	92:5, 92:6, 92:10,	107:4, 107:6, 107:8,	122:3, 122:8,
37:22, 38:9, 38:10,	68:10, 68:11, 68:13,	92:12, 92:16, 92:21,	107:11, 107:12,	122:10, 122:12,
38:11, 38:13, 39:8,	68:15, 68:16, 68:17,	92:23, 93:1, 93:2,	107:15, 107:16,	122:13, 122:16,
39:10, 39:13, 39:15,	68:18, 68:20, 68:21,	93:4, 93:9, 93:13,	107:17, 107:20,	122:17, 122:18,
39:19, 40:3, 40:9,	68:22, 68:24, 69:1,	93:15, 93:16, 93:18,	107:23, 108:1,	122:20, 122:22,
40:13, 40:14, 40:15,	69:3, 69:6, 69:9,	93:19, 93:21, 93:22,	108:2, 108:3, 108:4,	123:2, 123:3, 123:4,
41:3, 41:10, 41:17,	69:10, 69:11, 69:12,	93:23, 93:24, 93:25,	108:5, 108:6, 108:9,	123:6, 123:7, 123:8,
41:20, 41:24, 42:6,	69:13, 69:15, 69:18,	94:1, 94:2, 94:3,	108:12, 108:13,	123:9, 123:21,
42:12, 42:14, 42:17,	69:21, 69:23, 70:1,	94:4, 94:5, 94:6,	108:15, 108:18,	123:23, 124:7,
42:19, 42:25, 43:5,	70:5, 70:6, 70:7,	94:7, 94:8, 94:9,	108:19, 108:21,	124:8, 124:9,
43:17, 43:18, 43:20,	70:17, 70:24, 71:2,	94:10, 94:12, 94:13,	108:25, 109:2,	124:11, 124:13,
43:23, 43:24, 44:7,	71:8, 71:12, 71:13,	94:14, 94:21, 94:22,	109:5, 109:9,	124:14, 124:17,
44:17, 44:20, 44:22,	72:8, 73:11, 74:14,	94:23, 94:24, 94:25,	109:12, 109:15,	124:19, 124:23,
45:1, 45:5, 45:8,	74:15, 74:18, 74:19,	95:2, 95:3, 95:4,	109:16, 109:20,	124:24, 125:8,
45:22, 45:23, 46:9,	74:22, 74:25, 75:2,	95:5, 95:6, 95:7,	109:25, 110:1,	126:3, 126:7, 126:9,

126:10, 126:16,
 126:18, 126:19,
 126:20, 126:21,
 126:24, 126:25,
 127:4, 127:5, 127:6,
 127:8, 127:9,
 127:11, 127:12,
 127:13, 127:15,
 127:16, 127:17,
 127:18, 127:23,
 128:3, 128:9,
 128:11, 128:12,
 128:14, 128:15,
 128:19, 128:20,
 128:21, 129:3,
 129:4, 129:5, 129:7,
 129:8, 129:10,
 129:11, 129:12,
 129:13, 129:16,
 129:21, 129:25,
 130:1, 130:5, 130:7,
 130:12, 130:15,
 130:16, 130:17,
 130:24, 131:5,
 131:10, 131:11,
 131:15, 131:16,
 131:17, 131:19,
 131:21, 131:22,
 132:1, 132:2, 132:3,
 132:5, 132:6, 132:7,
 132:8, 132:11,
 132:12, 132:17,
 132:19, 132:21,
 132:24, 132:25,
 133:1, 133:7,
 133:17, 133:18,
 133:19, 133:24,
 134:1, 134:2, 134:5,
 134:8, 134:14,
 134:19, 134:20,
 134:23, 134:24,
 135:2, 135:3, 135:7,
 135:11, 135:12,
 135:15, 135:19,
 135:22, 135:23,
 136:1, 136:6,
 136:18, 136:19,
 136:24, 137:3,
 137:7, 137:8,
 137:10, 137:13,
 137:20, 137:23,
 137:24, 138:2,
 138:7, 138:13,
 138:14, 139:1,
 139:3, 139:4,
 139:10, 139:12,
 139:17, 139:21,
 139:25, 140:8,
 140:9, 140:10,
 140:11, 140:13,
 140:16, 140:21,
 140:25, 141:2,
 141:5, 141:6, 141:7,
 141:11, 141:12,
 141:15, 141:16,
 141:21, 141:23,
 141:24, 142:1,
 142:2, 142:4, 142:7,
 142:9, 142:10,
 142:11, 142:16,
 142:20, 142:21,
 142:22, 143:1,
 143:4, 143:6,
 143:11, 143:15,
 143:17, 143:19,
 143:25, 144:2,
 144:5, 144:6, 144:7,
 144:8, 144:13,
 144:14, 144:17,
 144:18, 144:22,
 144:24, 145:2,
 145:3, 145:8, 145:9,
 145:11, 145:16,
 145:17, 145:21,
 146:3, 146:4, 146:6,
 146:9, 146:13,
 146:17, 146:19,
 146:24, 147:1,
 147:4, 147:13,
 147:14, 147:16,
 147:17, 147:18,
 147:23, 147:24,
 147:25, 148:8,
 148:9, 148:12,
 148:16, 148:19,
 148:22, 148:24,
 149:2, 149:5, 149:7,
 149:8, 149:9,
 149:10, 149:13,
 149:14, 149:16,
 149:20, 149:22,
 149:23, 150:4,
 150:7, 150:12,
 150:15, 150:22,
 150:23, 151:3,
 151:6, 151:11,
 151:13, 151:19,
 151:21, 152:2,
 152:4, 152:6, 152:8,
 152:9, 152:10,
 152:12, 152:13,
 152:15, 152:19,
 152:20, 152:22,
 152:23, 152:25,
 153:1, 153:3, 153:4,
 153:5, 153:7,
 153:12, 153:13,
 153:16, 153:17,
 153:18, 153:19,
 153:22, 153:23,
 153:25, 154:1,
 154:2, 154:3, 154:7,
 154:8, 154:12,
 154:16, 154:17,
 154:18, 154:20,
 154:21, 154:23,
 155:1, 155:4, 155:5,
 155:7, 155:9,
 155:10, 155:11,
 155:14, 155:25,
 156:8, 156:9,
 156:12, 156:20,
 156:22, 157:2,
 157:4, 157:10,
 157:11, 157:14,
 157:16, 157:19,
 158:2, 158:4, 158:7,
 158:8, 158:9,
 158:14, 158:15,
 158:17, 158:19,
 158:20, 159:3,
 159:4, 159:5, 159:6,
 159:7, 159:10,
 159:11, 159:12,
 159:13, 159:15,
 159:17, 159:19,
 159:20, 160:1,
 160:3, 160:5, 160:7,
 160:10, 160:13,
 160:18, 160:21,
 161:5, 161:9,
 161:12, 161:14,
 161:15, 161:20,
 161:21, 161:25,
 162:2, 162:3, 162:7,
 162:9, 162:17,
 162:18, 162:20,
 162:23, 163:5,
 163:6, 163:8,
 163:18, 163:19,
 163:20, 163:22,
 163:24, 163:25,
 164:2, 164:4, 164:8,
 164:12, 164:18,
 164:20, 164:21
THEIR ^[35] - 14:4,
 15:25, 18:15, 18:16,
 20:12, 20:13, 34:4,
 34:5, 34:6, 42:16,
 42:21, 51:14, 52:20,
 53:15, 61:16, 63:15,
 65:7, 67:16, 74:7,
 83:3, 85:13, 86:10,
 89:2, 102:14,
 102:16, 103:19,
 103:20, 103:21,
 115:8, 117:5, 117:7,
 121:9, 145:9, 146:4
THEM ^[31] - 9:3, 9:4,
 9:17, 17:7, 20:17,
 41:1, 44:12, 49:18,
 49:20, 50:3, 50:5,
 50:6, 51:15, 51:24,
 53:5, 59:16, 59:20,
 59:21, 60:3, 60:7,
 81:25, 83:18, 84:1,
 85:3, 89:2, 89:11,
 138:10, 139:11,
 151:1, 153:7, 153:16
THEMSELVES ^[3] -
 63:24, 64:3, 104:23
THEN ^[107] - 5:15, 6:1,
 6:13, 7:8, 11:8,
 11:12, 14:5, 14:16,
 19:3, 20:17, 27:11,
 33:14, 34:11, 35:10,
 36:16, 37:4, 37:13,
 37:14, 37:17, 39:5,
 52:16, 54:11, 61:12,
 66:24, 67:4, 68:9,
 74:17, 75:1, 76:8,
 80:1, 81:12, 82:25,
 84:9, 84:21, 85:3,
 85:15, 86:2, 87:22,
 88:16, 88:20, 89:3,
 91:25, 93:16, 93:20,
 94:3, 94:7, 94:10,
 95:3, 95:21, 95:24,
 96:4, 96:17, 96:22,
 96:25, 98:19, 98:23,
 99:4, 99:8, 101:14,
 102:25, 103:19,
 104:13, 104:23,
 104:24, 104:25,
 106:13, 117:9,
 117:14, 121:8,
 124:6, 124:16,
 128:11, 132:4,
 137:13, 140:15,
 140:16, 142:14,
 142:24, 144:13,
 147:12, 148:5,
 148:7, 148:19,
 149:23, 149:24,
 150:1, 150:13,
 150:15, 150:20,
 151:1, 151:6,
 151:21, 151:25,
 152:18, 154:23,
 155:4, 155:20,
 156:14, 157:1,
 158:16, 159:3,
 159:4, 161:12, 162:9
THERE ^[165] - 3:20,
 6:13, 7:4, 7:5, 7:25,
 8:3, 9:9, 11:1, 11:8,
 11:9, 11:12, 11:13,
 12:24, 15:14, 15:17,
 17:11, 18:13, 18:14,
 18:17, 19:11, 20:11,
 21:21, 22:21, 24:2,
 25:19, 25:20, 26:10,
 26:11, 26:24, 26:25,
 29:15, 29:18, 29:20,
 30:3, 30:7, 30:8,
 30:11, 30:13, 30:17,
 30:20, 30:21, 31:9,
 31:11, 31:21, 33:17,
 34:18, 34:20, 35:6,
 37:2, 37:8, 37:11,
 41:12, 42:5, 54:6,
 55:22, 56:11, 56:25,
 57:8, 61:16, 62:9,
 63:11, 64:9, 67:5,
 67:9, 67:13, 67:18,
 68:9, 68:14, 68:24,
 69:4, 69:9, 69:11,
 70:8, 72:16, 72:24,
 73:19, 73:23, 74:24,
 75:1, 76:9, 76:15,
 77:3, 81:24, 82:17,
 83:15, 84:9, 84:15,
 89:5, 93:18, 95:16,
 95:20, 96:20, 97:12,
 98:5, 101:22,
 102:10, 102:15,
 103:11, 103:17,
 105:21, 106:1,
 107:21, 108:11,
 108:17, 108:23,
 109:4, 109:17,
 113:17, 115:16,
 115:19, 116:14,
 116:15, 117:6,
 118:9, 121:5,
 123:20, 124:5,
 124:15, 124:16,
 130:14, 130:22,
 131:25, 132:14,
 132:18, 132:20,
 134:18, 136:6,
 138:5, 139:21,
 140:2, 141:4, 142:5,
 142:9, 142:14,
 142:17, 142:18,
 142:21, 143:5,
 144:12, 145:2,
 145:22, 145:23,
 146:21, 147:6,
 147:9, 147:20,
 148:12, 148:25,
 149:16, 152:6,
 152:19, 155:9,
 155:13, 155:17,
 155:19, 157:5,
 157:6, 159:23,
 159:25, 163:17
THERE'S ^[2] - 161:19,
 163:16
THEREFORE ^[1] -
 18:11
THESE ^[41] - 8:6, 13:9,
 14:5, 17:23, 22:7,
 24:6, 24:13, 24:21,
 25:15, 25:25, 26:5,

26:7, 26:11, 40:24,
40:25, 41:2, 42:18,
44:10, 44:15, 50:2,
51:11, 51:24, 63:19,
64:14, 66:18, 67:6,
67:17, 68:23, 72:6,
93:12, 94:19, 114:8,
130:9, 133:20,
134:6, 140:9,
140:24, 143:11,
148:25, 154:24,
160:11
THEY [104] - 3:15,
11:18, 12:8, 13:14,
14:3, 14:4, 16:14,
17:8, 17:9, 26:18,
26:19, 34:4, 34:7,
37:13, 37:14, 41:3,
41:4, 41:7, 41:11,
42:9, 42:17, 42:18,
42:21, 44:16, 49:19,
50:15, 53:22, 53:24,
53:25, 54:7, 54:8,
54:9, 54:11, 57:18,
57:20, 59:22, 60:4,
60:16, 60:17, 63:24,
64:2, 67:4, 68:11,
69:15, 72:20, 74:8,
74:10, 74:21, 75:3,
75:4, 75:12, 75:13,
83:23, 85:21, 88:10,
89:3, 89:4, 92:17,
94:14, 95:3, 95:4,
95:5, 95:22, 96:14,
111:10, 115:8,
115:11, 116:18,
121:3, 122:15,
129:9, 130:10,
130:12, 130:18,
134:24, 135:2,
135:4, 135:5,
135:11, 135:12,
135:13, 135:15,
136:22, 137:23,
138:8, 138:12,
138:14, 139:8,
139:13, 140:7,
140:10, 142:9,
144:1, 144:6,
145:13, 146:22,
153:6, 155:22
THIN [1] - 58:4
THING [17] - 6:20,
16:12, 31:3, 41:10,
47:21, 70:3, 72:18,
74:12, 126:1,
133:15, 140:8,
146:24, 147:16,
154:8, 158:11,
159:21, 161:15
THINGS [31] - 11:15,
12:25, 14:25, 21:15,
22:7, 32:7, 42:6,
42:18, 42:21, 44:15,
53:22, 57:13, 57:16,
57:22, 64:24, 68:7,
68:8, 74:11, 77:3,
97:14, 103:14,
110:3, 113:4,
140:14, 143:12,
147:19, 148:25,
152:12, 155:18,
157:11, 164:13
THINK [65] - 8:7, 9:18,
19:14, 24:17, 36:23,
44:22, 46:25, 48:19,
48:20, 48:22, 53:5,
54:25, 63:18, 63:22,
64:1, 67:21, 69:12,
74:16, 75:3, 82:10,
92:3, 94:17, 96:12,
112:9, 112:11,
112:21, 113:4,
122:22, 124:11,
127:15, 128:5,
128:8, 131:8,
131:14, 132:11,
136:14, 137:6,
145:16, 146:14,
146:18, 150:24,
152:5, 152:13,
152:18, 153:14,
155:18, 156:24,
157:2, 157:3, 157:8,
157:18, 157:25,
159:8, 159:10,
159:13, 159:25,
160:2, 160:4, 161:3,
161:15, 161:18,
162:13, 162:21,
163:2, 164:3
THINKING [11] -
10:13, 14:20, 32:12,
134:5, 136:18,
143:7, 150:18,
157:3, 159:19,
160:5, 160:18
THIRD [2] - 32:22,
40:3
THIRDS [1] - 114:23
THIS [346] - 3:16, 3:18,
7:12, 9:18, 13:9,
13:13, 13:21, 14:3,
14:6, 16:17, 16:22,
17:3, 17:9, 17:18,
17:24, 18:4, 18:19,
19:6, 20:12, 20:15,
20:16, 20:21, 20:24,
21:1, 21:12, 21:22,
22:2, 22:11, 22:14,
22:18, 22:19, 22:20,
22:23, 23:18, 24:4,
24:10, 24:18, 25:1,
25:5, 25:7, 25:9,
25:12, 26:22, 26:25,
27:12, 27:15, 27:17,
28:7, 28:10, 28:14,
28:19, 28:24, 29:1,
29:3, 29:5, 29:11,
29:18, 29:20, 29:23,
30:1, 30:12, 30:14,
31:17, 31:19, 31:21,
31:22, 32:2, 32:10,
32:19, 32:24, 33:6,
33:20, 33:25, 35:3,
35:4, 35:9, 35:16,
36:9, 36:10, 36:20,
36:21, 37:2, 37:6,
37:9, 37:22, 38:1,
38:2, 38:3, 38:7,
38:13, 38:23, 38:24,
39:4, 39:10, 39:13,
39:14, 39:15, 39:20,
39:21, 40:1, 40:2,
40:6, 40:10, 40:13,
40:14, 41:20, 44:3,
47:9, 47:14, 47:16,
47:22, 47:25, 48:9,
48:17, 51:20, 52:7,
52:9, 52:18, 52:19,
52:22, 52:25, 53:3,
53:6, 54:7, 55:15,
55:25, 56:5, 57:23,
58:1, 58:4, 59:10,
59:16, 59:23, 59:25,
60:2, 60:5, 60:24,
61:1, 61:10, 61:23,
61:24, 61:25, 62:1,
64:6, 64:10, 64:21,
65:10, 65:16, 65:24,
66:1, 66:5, 66:11,
66:21, 66:23, 67:6,
67:10, 67:23, 68:2,
68:21, 68:22, 69:24,
70:2, 70:3, 70:11,
70:24, 71:6, 71:11,
71:19, 71:25, 72:7,
72:11, 72:21, 75:16,
75:20, 76:24, 78:7,
78:9, 78:19, 79:1,
81:4, 81:10, 83:20,
85:7, 85:10, 85:11,
86:7, 86:8, 86:9,
86:12, 87:1, 87:12,
87:23, 88:22, 88:24,
88:25, 89:12, 89:15,
89:23, 89:25, 90:1,
90:5, 90:6, 90:18,
91:4, 91:15, 92:1,
92:6, 93:3, 93:6,
94:11, 94:17, 95:13,
95:16, 96:1, 96:5,
96:8, 96:10, 96:22,
96:24, 97:19, 97:20,
98:20, 98:24, 99:5,
99:9, 99:12, 99:14,
99:16, 99:21, 100:9,
101:25, 102:3,
102:7, 102:20,
103:16, 103:17,
103:23, 104:4,
104:6, 104:15,
104:20, 104:22,
105:19, 105:25,
106:7, 106:16,
106:20, 107:4,
107:11, 107:13,
107:15, 108:9,
108:12, 108:13,
108:19, 108:23,
108:25, 109:4,
109:17, 109:18,
110:20, 114:10,
115:7, 116:10,
116:18, 117:1,
117:17, 117:23,
119:3, 119:6,
119:15, 119:24,
120:2, 120:14,
120:15, 121:8,
121:20, 122:1,
122:6, 123:10,
123:24, 124:1,
124:3, 124:4, 125:7,
125:11, 125:20,
125:23, 127:15,
127:25, 128:9,
130:9, 131:13,
136:7, 137:14,
137:24, 138:12,
138:14, 138:25,
139:6, 139:22,
140:7, 141:13,
143:7, 146:11,
146:16, 147:4,
148:1, 148:16,
149:4, 153:17,
155:1, 156:6, 156:7,
156:21, 157:3,
157:15, 158:7,
158:9, 159:9,
159:21, 159:24,
160:1, 160:15,
160:18, 160:21,
160:23, 162:19,
162:21, 162:22,
163:2, 163:6, 163:7,
163:14, 163:16,
163:20, 164:13
THIS [1] - 54:21
THOSE [74] - 8:1, 8:5,
9:17, 11:17, 12:9,
14:25, 16:6, 20:10,
25:14, 26:17, 32:7,
37:14, 41:15, 42:5,
42:20, 49:22, 50:1,
50:7, 51:23, 53:24,
57:13, 57:16, 57:21,
63:22, 66:16, 66:25,
72:25, 73:19, 74:22,
76:24, 79:4, 85:2,
89:11, 97:22,
101:20, 101:22,
105:7, 109:23,
110:2, 110:24,
111:20, 111:22,
114:22, 121:7,
123:19, 129:10,
132:24, 134:9,
139:2, 139:17,
141:1, 142:23,
143:19, 143:21,
144:1, 144:11,
145:12, 145:16,
147:8, 147:11,
147:21, 148:3,
148:6, 149:2, 150:9,
150:11, 151:10,
151:12, 152:2,
154:9, 155:6,
156:23, 158:23,
160:17
THOUGH [2] - 57:19,
109:25
THOUGHT [7] - 35:7,
60:15, 134:5,
134:11, 136:18,
139:4, 146:11
THOUGHTS [1] -
40:22
THOUSANDS [2] -
11:23, 12:3
THREE [16] - 37:15,
49:15, 59:23, 59:24,
69:14, 93:17, 98:1,
98:4, 98:7, 100:19,
104:22, 125:4,
139:4, 147:23,
154:11, 154:15
THROUGH [36] - 9:25,
11:3, 12:11, 15:7,
18:20, 24:17, 24:18,
30:20, 51:14, 67:12,
93:2, 93:14, 94:8,
94:9, 97:21, 99:6,
107:8, 107:9,
113:12, 122:15,
128:15, 132:22,
139:20, 140:5,
140:13, 142:11,
142:23, 142:24,
143:11, 146:20,
148:13, 153:16,

157:15, 161:24,
163:11
THROUGHOUT [8] -
20:6, 85:13, 89:8,
98:9, 98:12, 101:20,
106:5, 122:18
THYROID [1] - 54:4
TIGHTNESS [1] -
40:19
TIME [188] - 5:19, 5:22,
5:23, 7:2, 7:3, 12:19,
14:1, 19:4, 21:13,
21:18, 22:15, 23:14,
25:1, 25:7, 25:12,
27:10, 27:14, 28:3,
33:8, 34:5, 35:14,
37:22, 38:13, 38:23,
40:2, 40:14, 42:5,
44:25, 46:14, 48:17,
51:20, 55:1, 60:1,
63:1, 65:1, 65:16,
65:24, 68:8, 76:24,
78:7, 79:12, 83:12,
84:11, 84:13, 84:14,
84:15, 84:17, 84:24,
86:2, 86:3, 86:5,
88:14, 89:4, 89:8,
90:2, 92:21, 93:22,
93:23, 93:25, 94:1,
94:2, 94:3, 94:5,
94:6, 94:9, 94:13,
95:8, 95:9, 95:17,
95:21, 97:15, 97:16,
97:22, 98:10, 99:24,
100:6, 100:16,
101:19, 101:21,
102:4, 102:10,
102:11, 102:14,
102:15, 102:16,
102:20, 105:7,
107:14, 107:16,
107:19, 107:20,
107:22, 107:25,
108:2, 108:5, 108:8,
108:11, 108:16,
108:17, 108:22,
108:24, 109:3,
109:5, 113:2,
114:24, 116:23,
117:5, 117:7, 117:8,
117:12, 117:13,
117:15, 117:18,
117:19, 117:23,
117:25, 118:9,
118:10, 118:11,
118:13, 118:15,
118:22, 119:12,
121:3, 121:10,
124:19, 124:23,
124:24, 125:6,
125:8, 125:11,
125:12, 125:16,
125:22, 126:2,
126:14, 126:15,
126:23, 127:11,
130:16, 131:9,
131:11, 131:15,
132:4, 134:1, 134:2,
135:21, 139:15,
139:20, 140:1,
141:6, 141:17,
141:21, 141:23,
141:25, 142:1,
142:24, 143:3,
143:8, 143:16,
144:3, 144:12,
144:14, 144:16,
149:6, 149:20,
154:5, 154:16,
154:25, 155:15,
158:4, 160:2, 160:7
TIME'S [1] - 66:9
TIMED [2] - 95:1,
131:5
TIMELINE [2] - 141:3,
159:16
TIMELINES [1] -
159:12
TIMELY [1] - 34:8
TIMES [13] - 23:18,
40:13, 45:20, 45:23,
45:24, 50:20, 72:25,
83:14, 83:22, 99:2,
142:1, 143:25,
162:20
TIMING [22] - 21:24,
85:10, 85:13, 86:13,
87:1, 87:12, 87:23,
88:8, 88:16, 89:3,
93:1, 98:8, 102:1,
106:1, 106:2, 106:4,
107:12, 122:13,
125:22, 133:19,
146:19
TIMOTHY [5] - 4:6,
4:13, 4:17, 4:18,
165:3
TINA [4] - 32:20, 38:2,
39:21, 70:25
TIREDDNESS [1] - 65:3
TITLE [1] - 16:4
TMS [1] - 7:9
TO [755] - 3:6, 3:9,
3:10, 3:15, 5:1, 5:8,
5:25, 6:11, 6:21,
7:15, 8:6, 9:18, 10:2,
10:12, 10:14, 11:2,
11:5, 11:7, 11:12,
11:13, 11:16, 11:19,
11:20, 12:1, 12:7,
12:9, 12:11, 12:13,
13:6, 13:23, 14:1,
14:4, 14:11, 14:12,
14:13, 14:23, 15:3,
15:15, 15:18, 15:20,
15:21, 16:14, 16:16,
16:17, 16:19, 17:1,
17:5, 17:6, 17:7,
17:8, 17:12, 17:25,
18:10, 18:21, 18:24,
18:25, 19:8, 19:12,
19:15, 20:20, 20:21,
20:24, 21:1, 21:5,
21:22, 22:9, 22:11,
22:18, 22:22, 22:25,
23:10, 23:11, 23:16,
23:17, 23:22, 24:2,
24:12, 24:13, 24:17,
24:18, 25:2, 25:3,
25:4, 25:5, 25:13,
25:14, 25:17, 25:18,
25:25, 26:8, 26:20,
26:21, 26:22, 26:24,
27:1, 27:3, 27:6,
27:11, 27:25, 28:3,
28:6, 28:19, 28:23,
29:8, 29:13, 29:14,
29:25, 30:12, 30:14,
30:19, 30:21, 30:22,
30:24, 30:25, 31:5,
31:13, 31:15, 31:25,
32:10, 32:11, 32:22,
33:3, 33:8, 33:10,
33:12, 33:20, 33:22,
33:25, 34:2, 34:7,
34:14, 34:16, 34:25,
35:12, 36:1, 36:3,
36:7, 36:16, 36:17,
36:19, 37:2, 37:8,
37:10, 37:11, 37:14,
37:18, 37:20, 38:3,
38:4, 38:9, 38:10,
39:1, 39:2, 39:10,
39:11, 39:19, 39:20,
40:3, 40:8, 40:9,
40:12, 40:18, 40:25,
41:8, 41:13, 41:20,
42:10, 42:16, 42:25,
43:1, 43:3, 43:5,
44:17, 44:19, 44:20,
44:25, 45:17, 46:7,
46:20, 47:8, 47:21,
47:24, 48:8, 48:18,
48:23, 49:5, 49:16,
49:21, 49:25, 50:5,
50:6, 50:7, 50:8,
50:9, 50:14, 50:15,
51:5, 52:7, 52:19,
52:20, 52:22, 52:24,
53:9, 53:10, 53:14,
53:17, 54:1, 54:4,
54:5, 54:10, 54:24,
55:10, 55:13, 56:5,
57:10, 57:21, 58:1,
58:3, 58:21, 59:4,
59:16, 59:22, 60:22,
62:15, 62:18, 62:23,
63:7, 63:19, 64:8,
64:11, 64:15, 64:24,
65:4, 65:6, 65:11,
65:17, 65:24, 66:12,
66:25, 67:9, 67:17,
68:8, 69:2, 69:9,
69:15, 69:25, 70:4,
70:10, 70:16, 70:17,
71:3, 71:7, 71:17,
72:3, 72:18, 72:23,
73:2, 73:7, 73:19,
73:24, 73:25, 74:14,
74:18, 74:24, 75:4,
75:7, 76:11, 77:25,
78:20, 79:8, 79:18,
79:19, 79:20, 79:21,
79:22, 81:10, 81:17,
81:18, 81:20, 82:11,
82:17, 82:23, 83:13,
83:15, 84:14, 85:1,
85:3, 85:20, 86:2,
86:18, 87:4, 87:11,
87:15, 88:1, 88:25,
89:6, 89:14, 89:16,
89:18, 90:10, 90:21,
91:7, 91:18, 92:9,
93:1, 93:2, 93:25,
95:14, 95:15, 95:18,
96:4, 96:6, 96:7,
96:11, 96:13, 96:17,
96:21, 96:24, 97:1,
97:2, 97:18, 97:20,
97:23, 98:2, 98:8,
98:19, 98:23, 99:4,
99:8, 99:15, 99:16,
99:17, 99:18, 99:20,
99:21, 99:24, 99:25,
100:6, 100:7,
100:14, 100:17,
100:19, 100:21,
100:23, 100:25,
101:6, 101:10,
101:14, 102:4,
102:5, 102:11,
102:13, 102:16,
102:17, 102:18,
102:20, 103:8,
103:18, 103:25,
104:6, 104:7, 104:9,
104:12, 104:13,
104:14, 104:17,
104:20, 104:22,
104:23, 104:24,
104:25, 105:3,
105:5, 105:7,
105:13, 105:21,
105:25, 106:6,
106:12, 106:14,
106:20, 107:1,
107:3, 107:7, 107:8,
108:3, 108:9,
108:16, 108:22,
109:3, 109:20,
109:21, 109:23,
110:1, 110:2, 110:3,
110:5, 111:1, 111:3,
111:5, 111:7, 111:8,
112:6, 112:10,
112:11, 112:21,
112:24, 112:25,
113:4, 113:11,
113:25, 114:9,
114:25, 115:4,
115:10, 115:12,
115:17, 116:6,
116:12, 116:22,
117:7, 117:15,
117:20, 118:21,
119:7, 119:16,
119:20, 120:15,
120:16, 120:20,
121:1, 121:2, 122:7,
122:23, 123:1,
123:11, 124:3,
124:8, 124:9,
124:14, 124:15,
124:22, 125:6,
125:14, 126:1,
126:2, 126:6, 126:7,
126:13, 126:14,
127:9, 127:10,
127:23, 128:11,
129:3, 129:5, 129:8,
129:25, 130:1,
130:8, 130:9,
130:10, 130:11,
130:14, 130:17,
130:24, 131:11,
131:22, 132:2,
132:7, 132:19,
133:1, 133:2, 133:9,
133:14, 133:20,
134:9, 134:22,
134:24, 135:3,
135:23, 136:7,
136:8, 136:10,
136:12, 136:14,
136:16, 136:18,
136:19, 136:20,
136:21, 136:23,
136:24, 137:4,
137:9, 137:10,
137:18, 138:5,
138:12, 138:20,
139:2, 139:5, 139:6,
139:20, 139:21,
139:23, 140:1,

140:3, 140:6, 140:9,
140:11, 140:14,
140:15, 140:19,
140:24, 140:25,
141:2, 141:3,
141:10, 141:21,
141:22, 141:23,
141:24, 142:15,
142:17, 142:24,
142:25, 143:1,
143:4, 143:5,
143:10, 143:13,
143:15, 143:17,
143:23, 144:3,
144:8, 144:12,
144:18, 144:23,
144:24, 145:13,
145:17, 145:19,
145:23, 146:5,
146:11, 146:12,
146:13, 146:17,
146:20, 146:21,
146:23, 146:25,
147:1, 147:5, 147:7,
147:14, 147:21,
147:24, 148:5,
148:15, 148:16,
148:17, 148:20,
148:22, 149:1,
149:4, 149:6, 149:7,
149:8, 149:10,
149:11, 149:12,
149:13, 150:5,
150:7, 150:23,
151:3, 151:7,
151:11, 151:12,
151:18, 151:24,
152:6, 152:7, 152:9,
152:15, 152:17,
152:18, 152:19,
152:20, 152:22,
152:23, 152:25,
153:1, 153:3, 153:7,
153:8, 153:11,
153:12, 153:13,
153:14, 153:18,
153:20, 153:22,
154:1, 154:3, 154:4,
154:6, 154:8, 154:9,
154:11, 154:13,
154:20, 154:21,
154:22, 154:24,
155:1, 155:5, 155:6,
155:7, 155:11,
155:16, 155:17,
155:18, 155:20,
155:23, 155:24,
156:1, 156:2, 156:4,
156:7, 156:11,
156:14, 156:15,
156:17, 156:18,

156:19, 156:22,
156:23, 157:1,
157:10, 157:11,
157:12, 157:13,
157:14, 157:19,
157:22, 157:25,
158:1, 158:4, 158:8,
158:9, 158:10,
158:19, 158:21,
159:4, 159:10,
159:11, 159:13,
159:20, 159:21,
159:25, 160:2,
160:5, 160:9,
160:11, 160:12,
160:13, 160:17,
160:18, 160:20,
161:2, 161:11,
161:13, 161:15,
161:20, 161:24,
162:8, 162:10,
162:23, 162:24,
163:3, 163:7, 163:9,
163:13, 163:20,
163:21, 163:22,
164:3, 164:4, 164:12

TODAY [15] - 3:16,
40:16, 44:11, 45:11,
45:18, 46:17, 73:16,
79:18, 120:16,
120:19, 122:8,
125:21, 146:19,
162:11, 164:14

TODAY'S [2] - 140:1

TOGETHER [6] - 7:1,
146:20, 147:17,
161:12, 163:12,
163:23

TOLD [5] - 21:24,
25:1, 140:24, 162:1,
162:19

TONE [1] - 150:23

TOO [6] - 113:5,
114:10, 116:24,
121:9, 143:16,
148:21

TOOK [4] - 89:9, 97:6,
104:21, 115:11

TOOL [4] - 13:12,
13:23, 14:7, 50:25

TOOLS [1] - 49:16

TOP [15] - 31:20, 36:1,
36:4, 36:19, 47:8,
49:15, 54:20, 55:4,
56:21, 85:10, 85:17,
85:19, 86:15,
128:12, 140:19

TOPIC [2] - 8:11,
143:22

TOPICS [2] - 112:19,

139:25

TOTAL [5] - 58:24,
94:8, 95:9, 105:2,
125:8

TOTALITY [1] - 105:19

TOTALLY [1] - 156:8

TOUGH [1] - 156:10

TOWARD [1] - 67:22

TOWARDS [9] - 69:1,
76:12, 97:9, 98:11,
99:3, 100:10,
101:23, 107:5,
122:21

TRACK [1] - 163:23

TRACKED [1] - 36:18

TRACKS [1] - 153:24

TRAINED [1] - 140:6

TRAINING [7] - 5:12,
6:18, 6:24, 110:18,
138:23, 140:23,
142:8

TRAITS [1] - 63:21

TRANSCRANIAL [1] -
6:4

TRANSCRIPT [17] -
1:22, 75:20, 84:5,
111:10, 130:23,
130:24, 147:2,
147:24, 148:16,
149:20, 159:4,
159:14, 159:16,
160:3, 160:6,
160:10, 164:21

TRANSCRIPTION [1] -
1:22

TRANSCRIPTS [5] -
44:2, 49:4, 84:3,
148:10, 148:24

TRANSMIT [1] -
147:14

TRANSMITTERS [1] -
75:14

TRAUMATIC [2] -
14:24, 15:1

TREAT [8] - 6:25, 7:7,
7:9, 8:12, 11:25,
12:6, 25:3, 54:4

TREATING [3] - 7:2,
12:6, 55:16

TREATISE [1] - 7:25

TREATMENT [8] - 6:4,
12:18, 20:7, 20:12,
20:17, 23:6, 24:8,
31:11

TRIAL [22] - 1:12,
3:17, 6:1, 6:11, 28:7,
130:9, 136:8,
144:24, 145:4,
146:12, 146:16,
147:2, 148:12,

151:5, 153:19,
159:16, 160:3,
162:18, 162:20,
163:7, 163:20

TRIALS [1] - 45:24

TRICK [2] - 103:13,
103:17

TRICKY [1] - 111:18

TRIED [2] - 15:15,
154:13

TRUE [43] - 7:12,
34:13, 46:5, 46:7,
47:22, 48:14, 49:7,
52:3, 52:5, 52:23,
55:8, 56:6, 56:11,
57:5, 60:12, 60:19,
60:20, 60:23, 61:7,
61:9, 61:12, 71:6,
71:11, 72:10, 72:19,
73:13, 73:23, 76:23,
78:3, 111:24, 115:6,
115:24, 116:9,
116:10, 117:4,
120:7, 120:10,
120:14, 120:22,
121:20, 121:24,
122:3, 122:6

TRUST [1] - 42:14

TRY [4] - 12:11, 44:17,
77:25, 140:25

TRYING [6] - 10:12,
24:13, 126:6, 152:9,
158:10, 160:20

TULANE [1] - 5:3

TURN [8] - 18:21,
20:24, 22:11, 27:11,
29:8, 39:20, 87:11,
103:20

TUTORIAL [14] -
84:10, 84:15, 84:24,
93:18, 117:9,
117:14, 117:18,
117:25, 144:3,
144:4, 144:7, 144:9,
144:12

TWEAKS [1] - 68:10

TWICE [3] - 56:20,
58:23, 129:3

TWO [35] - 21:21,
23:18, 24:12, 24:13,
24:21, 25:11, 25:15,
26:5, 26:7, 26:11,
37:15, 59:22, 69:22,
93:21, 97:14,
100:12, 100:14,
100:21, 100:25,
104:21, 114:23,
141:20, 149:13,
149:20, 150:3,
151:4, 151:22,

152:2, 152:7, 152:9,
152:21, 154:17,
156:18, 157:23,
157:25

TYPE [13] - 10:1,
11:25, 17:22, 18:4,
24:23, 41:22, 88:24,
93:16, 100:9, 102:8,
121:17, 158:11

TYPES [2] - 18:14,
68:10

TYPICAL [1] - 97:12

TYPICALLY [21] -
12:7, 13:8, 15:1,
16:10, 17:19, 18:19,
20:9, 40:21, 54:12,
54:15, 56:19, 59:21,
59:22, 61:15, 77:18,
82:14, 83:2, 83:8,
83:9, 83:22, 83:23

U

U.S [2] - 65:13, 82:14

UK [4] - 5:1, 5:2, 7:2,
51:11

ULTIMATELY [3] -
20:17, 26:3, 42:11

UNAVAILABLE [1] -
156:17

UNAVAILING [1] -
107:8

UNCOMMON [2] -
37:19, 37:20

UNDER [26] - 10:9,
10:17, 17:10, 17:14,
29:15, 29:20, 33:19,
52:14, 56:1, 56:2,
63:4, 64:17, 83:11,
83:24, 84:2, 102:8,
102:9, 112:14,
114:8, 114:22,
115:11, 116:18,
128:20, 137:15,
157:7, 157:21

UNDERNEATH [1] -
62:4

UNDERSTAND [6] -
18:10, 20:21, 68:1,
68:4, 110:8

UNDERSTANDING [4]
- 6:19, 82:20, 142:3,
142:6

UNDERSTOOD [3] -
47:18, 141:22, 146:2

UNDOUBTED [1] -
64:12

UNFAIRLY [1] -
133:22

UNFORTUNATELY

[1] - 74:1	119:2, 119:23,	UWORLD [1] - 138:7	WISE [1] - 131:13	81:11, 82:11, 83:16,
UNIT [1] - 81:11	119:25, 123:14,		WISE-VERSA [1] -	85:20, 85:25, 86:4,
UNITED [3] - 1:1, 1:6,	127:2, 127:3,	V	131:13	89:5, 94:22, 97:1,
114:1	127:22, 128:8,		VISIT [8] - 14:4, 22:12,	97:5, 99:24, 99:25,
UNIVERSITY [4] -	129:2, 132:2,	VAGUER [1] - 25:24	30:23, 31:17, 31:22,	100:6, 100:8, 102:4,
4:24, 5:4, 5:20, 63:2	132:18, 133:2,	VALID [4] - 50:1,	39:16, 56:3, 59:19	102:6, 102:10,
UNKNOWN [1] -	133:5, 133:10,	67:14, 81:19, 129:11	VOLUME [1] - 46:11	102:17, 103:20,
121:19	134:9, 137:21,	VALIDATION [1] -	VOMITING [1] - 31:3	104:20, 105:3,
UNLESS [3] - 58:9,	137:25, 140:16,	60:13		105:9, 106:1, 107:8,
89:22, 144:22	140:25, 142:9,	VALIDITY [4] - 67:10,	W	107:20, 112:14,
UNLIKE [1] - 141:8	148:17, 149:13,	67:13, 67:19, 69:10		116:5, 116:6,
UNLIKELY [1] - 129:9	156:12, 160:24,	VALUE [3] - 95:6,	WAIST [1] - 158:4	116:15, 116:17,
UNQUOTE [1] - 69:15	160:25, 162:5, 162:8	108:4, 129:4	WAIT [3] - 110:3,	118:1, 119:16,
UNRELATED [2] -	UPBRINGING [1] -	VARIATION [3] - 99:1,	155:17, 160:17	120:11, 121:14,
127:9, 133:20	63:25	100:16, 133:21	WAITING [1] - 35:16	124:5, 124:12,
UNSPECIFIED [9] -	UPDATE [1] - 3:15	VARIATIONS [1] -	WALK [2] - 8:22, 93:2	124:15, 124:16,
17:5, 17:9, 17:18,	UPON [2] - 43:2,	68:6	WALKS [1] - 34:2	125:8, 125:11,
17:19, 17:20, 17:23,	124:11	VARIOUS [2] - 18:14,	WANT [45] - 12:9,	125:16, 128:8,
24:23, 25:9, 31:10	UPTAKE [1] - 72:8	132:3	15:20, 20:19, 24:17,	131:25, 132:2,
UNTIL [7] - 96:25,	US [16] - 8:6, 24:10,	VARY [2] - 95:22,	24:18, 26:24, 28:6,	132:3, 132:11,
97:6, 99:25, 100:7,	24:17, 32:11, 32:12,	95:25	32:22, 34:25, 47:24,	132:19, 132:20,
102:5, 158:6, 160:17	32:17, 63:5, 121:21,	VARYING [2] - 11:3,	48:8, 58:3, 75:4,	136:18, 136:21,
UNUSED [12] - 84:16,	123:1, 135:23,	107:19	79:20, 96:6, 96:13,	137:21, 137:22,
94:1, 102:10,	146:15, 147:14,	VERBAL [1] - 158:22	99:15, 99:20,	137:24, 138:3,
107:16, 107:19,	147:23, 159:4,	VERBALIZED [1] -	102:18, 103:18,	139:1, 139:2, 139:7,
107:22, 117:18,	161:24, 164:14	33:21	106:6, 114:9,	139:18, 139:19,
117:25, 118:11,	USE [19] - 8:6, 15:2,	VERBALLY [1] - 53:4	136:16, 146:17,	139:21, 140:2,
118:12, 118:13,	32:2, 46:5, 82:10,	VERIFICATION [2] -	146:20, 146:21,	140:3, 141:17,
118:15	85:13, 89:20, 94:2,	53:16, 126:17	149:11, 152:16,	142:1, 142:16,
UNUSUAL [6] - 37:9,	94:4, 102:16, 108:8,	VERIFY [3] - 53:24,	152:17, 152:20,	142:21, 142:22,
37:10, 37:21,	108:15, 108:21,	54:2, 54:13	153:8, 153:11,	143:1, 144:1,
109:19, 132:12,	109:2, 117:4, 117:7,	VERSA [1] - 131:13	155:16, 156:22,	144:14, 145:7,
132:15	138:14, 147:24,	VERSION [2] - 13:21,	157:22, 157:25,	146:3, 151:3,
UP [100] - 7:11, 8:22,	161:25	75:8	158:4, 158:19,	156:19, 156:21,
16:16, 17:14, 17:23,	USED [9] - 24:6,	VERSIONS [1] - 11:9	158:21, 159:11,	159:19, 159:23,
23:11, 28:8, 29:3,	50:17, 50:25, 51:3,	VERSUS [4] - 1:5,	160:9, 161:12,	161:11, 161:20,
29:9, 29:14, 31:16,	113:24, 117:9,	18:16, 18:17, 57:11	161:13, 162:3,	162:1, 163:6, 163:7,
32:19, 36:1, 36:8,	118:9, 118:10,	VERUS [1] - 106:11	162:23	163:20
36:19, 38:1, 38:4,	138:22	VERY [31] - 12:10,	WANTED [9] - 36:3,	WASHINGTON [1] -
38:9, 38:24, 40:1,	USEFUL [3] - 73:4,	12:15, 12:21, 13:16,	43:3, 93:2, 96:5,	2:3
46:14, 47:7, 52:6,	93:14, 151:18	15:7, 18:18, 20:10,	96:14, 133:9,	WATCH [1] - 78:25
54:18, 54:24, 55:24,	USES [1] - 138:8	23:8, 29:9, 37:10,	136:10, 141:24,	WAX [1] - 61:14
56:2, 61:21, 62:1,	USING [4] - 52:21,	37:21, 38:24, 38:25,	143:23	WAY [30] - 1:15, 12:9,
65:2, 65:24, 70:12,	116:16, 131:21,	42:6, 49:19, 51:7,	WANTING [2] - 74:19,	15:17, 18:19, 36:16,
71:17, 75:15, 76:12,	132:14	57:19, 59:22, 60:1,	128:11	41:4, 57:11, 64:13,
76:13, 83:13, 85:1,	USMLE [30] - 27:25,	72:5, 72:13, 79:23,	WANTS [2] - 25:5,	74:25, 95:17,
85:4, 85:6, 85:17,	33:12, 34:11, 44:5,	86:15, 97:16, 131:3,	112:25	103:13, 109:20,
86:25, 87:22, 88:21,	44:21, 45:1, 81:2,	139:18, 148:25,	WAS [126] - 5:21,	110:2, 112:18,
90:1, 90:17, 91:3,	82:2, 82:3, 82:4,	163:14	10:12, 10:13, 19:16,	115:12, 126:20,
91:14, 91:25, 94:16,	83:11, 83:23, 89:6,	VIA [2] - 1:9, 51:13	21:25, 26:10, 27:10,	136:3, 140:16,
96:4, 96:9, 98:3,	89:21, 96:15, 99:21,	VICE [2] - 81:2, 82:1	28:22, 30:16, 31:3,	140:25, 141:24,
99:13, 100:2,	110:23, 111:9,	- 81:2, 82:1	35:13, 35:15, 37:2,	142:14, 146:13,
101:25, 104:3,	111:11, 126:4,	VIEW [1] - 131:4	37:3, 37:4, 39:7,	146:17, 148:16,
104:8, 107:11,	126:16, 126:18,	VIGNETTE [2] -	46:25, 48:2, 48:5,	148:20, 157:14,
107:23, 108:13,	126:19, 128:19,	140:11, 140:14	55:16, 55:20, 58:13,	162:7, 162:24,
108:19, 108:25,	131:6, 131:16,	VIGNETTES [1] -	68:22, 69:15, 69:16,	163:20, 163:25
112:5, 113:9,	134:14, 138:13,	107:9	69:17, 69:24, 70:10,	WAYNE [1] - 61:15
115:14, 116:25,	139:25, 153:22	VIRGINIA [4] - 5:9,	72:5, 73:16, 73:17,	WAYS [3] - 63:24,
117:7, 118:24,	USUALLY [4] - 21:5,	47:1, 47:2, 47:3	73:19, 76:2, 76:4,	75:8, 136:7
118:25, 119:1,	37:15, 83:9, 158:14		76:10, 76:23, 78:20,	WE [290] - 3:6, 3:9,

3:10, 3:19, 6:24,
7:21, 11:2, 11:7,
12:5, 12:6, 12:11,
12:15, 12:25, 13:6,
13:8, 14:23, 15:2,
18:19, 18:21, 18:23,
19:3, 19:18, 19:20,
20:9, 21:5, 22:4,
22:11, 24:14, 24:15,
24:17, 25:6, 25:7,
25:11, 25:13, 25:17,
25:18, 25:19, 26:15,
26:21, 27:4, 27:5,
27:11, 27:22, 28:7,
28:8, 28:11, 28:12,
28:23, 29:8, 29:12,
30:11, 30:14, 30:22,
30:25, 31:7, 31:15,
31:23, 32:2, 32:20,
32:21, 32:24, 33:4,
34:16, 34:17, 34:24,
35:4, 35:7, 35:17,
35:25, 36:4, 37:7,
38:1, 38:3, 40:3,
40:8, 40:14, 40:16,
42:8, 42:14, 42:24,
43:4, 44:11, 45:13,
47:7, 48:22, 51:12,
52:6, 53:2, 53:6,
54:18, 54:19, 54:23,
55:3, 55:24, 56:8,
56:22, 57:1, 58:10,
59:21, 63:18, 64:13,
64:15, 66:12, 67:12,
67:20, 67:21, 70:1,
70:11, 70:12, 70:16,
70:21, 70:25, 71:16,
71:17, 71:22, 74:18,
75:15, 76:2, 76:5,
76:11, 77:4, 77:16,
77:25, 79:17, 79:23,
79:25, 80:1, 83:18,
83:20, 85:2, 85:3,
85:4, 85:7, 85:8,
86:3, 86:6, 86:9,
86:18, 87:4, 87:11,
87:15, 87:22, 88:9,
88:21, 88:22, 89:8,
89:20, 89:23, 90:17,
91:3, 91:14, 91:25,
93:3, 93:18, 94:16,
94:17, 95:11, 95:16,
96:4, 96:9, 96:12,
96:15, 96:17, 96:18,
97:19, 98:3, 98:4,
98:5, 98:15, 98:19,
98:20, 98:23, 98:25,
99:1, 99:4, 99:5,
99:8, 99:9, 99:12,
99:14, 99:17, 99:18,
100:2, 100:23,
100:25, 101:2,
101:4, 101:6,
101:10, 101:14,
101:25, 102:8,
102:21, 104:3,
104:8, 104:9,
104:14, 104:24,
105:1, 105:13,
106:6, 106:10,
106:11, 106:14,
106:21, 107:1,
107:3, 107:5,
107:11, 107:17,
107:23, 108:7,
108:13, 108:19,
108:25, 112:5,
113:2, 113:19,
115:14, 115:21,
115:22, 116:25,
118:5, 118:6, 118:7,
118:8, 118:24,
119:6, 119:12,
119:13, 119:23,
120:5, 120:6,
121:21, 121:23,
122:23, 127:2,
127:3, 127:22,
128:8, 128:10,
132:1, 132:6,
133:14, 138:22,
140:6, 140:17,
140:18, 145:2,
145:9, 146:13,
146:16, 146:21,
147:2, 147:3,
147:19, 147:22,
147:23, 147:24,
149:4, 149:23,
150:9, 155:2,
157:14, 160:23,
160:25, 161:9,
161:11, 161:18,
162:1, 162:5, 163:1,
163:4, 163:5,
164:12, 164:13
WEATHER [1] - 158:5
WEBSITE [5] - 47:10,
73:2, 113:10, 141:7,
144:6
WEEK [6] - 14:16,
37:18, 59:15, 79:2,
115:7, 116:13
WEEKENDS [1] -
33:22
WEEKLY [2] - 7:5,
46:12
WEEKS [4] - 14:19,
149:20, 160:24,
160:25
WEIGH [1] - 157:11
WELCOME [2] -
110:15, 137:9
WELL [63] - 3:25,
7:25, 10:8, 10:25,
11:23, 19:2, 20:3,
24:23, 27:17, 33:15,
35:8, 38:17, 38:21,
38:22, 39:18, 41:14,
41:15, 41:18, 41:24,
44:13, 45:12, 46:9,
49:18, 50:7, 51:7,
51:10, 60:15, 61:10,
67:11, 68:15, 68:18,
73:11, 74:24, 75:2,
89:17, 94:10, 94:17,
98:18, 101:24,
103:23, 110:1,
110:14, 111:6,
132:12, 132:14,
136:6, 137:13,
138:25, 139:6,
141:12, 142:4,
145:11, 148:9,
148:14, 150:8,
150:10, 151:20,
153:24, 154:22,
156:11, 157:3,
159:10, 164:18
WELL-BEING [1] -
75:2
WELL-RECOGNIZED
[1] - 7:25
WENT [3] - 5:1,
104:17, 119:12
WERE [37] - 3:15,
19:23, 27:18, 35:8,
39:9, 44:3, 44:11,
44:12, 46:19, 49:5,
54:7, 64:5, 66:18,
69:21, 69:23, 70:2,
71:13, 104:21,
105:5, 105:18,
121:23, 123:2,
129:3, 132:5,
132:11, 132:14,
132:19, 132:24,
134:5, 135:13,
136:12, 136:17,
142:5, 142:17,
142:22
WEST [3] - 5:9, 47:2,
47:3
WHAT [146] - 3:19,
4:23, 6:6, 8:9, 10:23,
12:14, 13:7, 13:20,
15:24, 16:1, 17:12,
17:17, 18:23, 18:24,
19:7, 19:8, 19:18,
20:17, 21:8, 21:22,
21:24, 23:3, 24:2,
24:3, 27:8, 27:15,
29:16, 31:19, 32:21,
33:6, 33:24, 34:9,
34:20, 35:3, 36:9,
36:20, 36:21, 37:1,
37:7, 37:21, 38:11,
39:4, 39:14, 39:15,
40:10, 48:23, 49:15,
51:5, 53:5, 53:22,
55:5, 55:22, 56:10,
56:14, 56:21, 58:10,
58:13, 61:25, 66:14,
66:18, 68:13, 74:14,
75:5, 76:15, 77:14,
79:8, 81:1, 81:14,
81:20, 81:21, 85:1,
85:7, 85:9, 85:17,
85:19, 86:7, 90:1,
93:12, 94:19, 98:20,
98:25, 99:5, 99:9,
100:21, 100:24,
101:4, 101:8,
101:12, 101:16,
101:17, 102:8,
105:9, 107:20,
117:19, 122:23,
123:10, 123:19,
124:19, 125:11,
125:16, 125:24,
126:7, 131:16,
132:5, 132:19,
133:15, 133:20,
134:17, 137:22,
137:23, 138:17,
138:22, 138:24,
139:19, 140:10,
140:14, 142:6,
142:16, 143:8,
144:4, 144:8, 146:5,
146:10, 148:11,
149:12, 150:18,
150:21, 150:24,
151:19, 152:1,
153:11, 153:12,
153:14, 156:2,
156:3, 157:20,
159:7, 159:12,
159:15, 161:11,
162:1, 162:5,
162:13, 163:9
WHATEVER [3] -
69:16, 151:14,
158:24
WHEELHOUSE [1] -
25:5
WHEN [63] - 8:8, 12:5,
12:7, 12:17, 14:19,
17:19, 18:22, 19:25,
33:22, 34:10, 37:16,
38:19, 41:21, 41:25,
42:8, 42:24, 44:10,
44:14, 46:19, 49:16,
50:8, 53:4, 55:20,
64:5, 69:2, 70:6,
74:12, 82:12, 82:21,
82:25, 83:7, 85:25,
86:4, 93:22, 93:24,
97:6, 97:15, 100:3,
106:10, 111:9,
114:2, 121:9,
124:22, 127:5,
127:8, 130:22,
138:2, 138:23,
140:4, 140:8,
140:13, 140:15,
140:18, 141:2,
141:17, 142:22,
142:23, 147:24,
151:11, 154:4,
160:4, 160:6, 163:15
WHENEVER [1] - 9:8
WHERE [52] - 5:18,
6:2, 6:8, 7:8, 11:4,
11:10, 14:3, 16:20,
20:11, 38:4, 48:9,
51:10, 51:17, 52:12,
57:2, 62:8, 63:4,
66:6, 67:2, 69:3,
69:20, 70:17, 70:21,
70:24, 71:2, 71:23,
73:17, 83:25, 85:21,
97:12, 97:18,
101:21, 102:15,
103:11, 104:10,
107:7, 113:19,
114:7, 114:25,
123:16, 124:5,
125:3, 130:15,
130:22, 136:21,
141:9, 145:21,
156:17, 156:18,
157:2, 158:15,
160:15
WHEREAS [1] - 14:18
WHETHER [13] - 11:6,
20:21, 24:25, 42:2,
53:3, 64:25, 116:15,
122:14, 122:16,
147:20, 154:18,
157:6, 158:20
WHICH [56] - 5:16,
6:14, 8:3, 11:2, 11:9,
15:14, 17:10, 17:19,
19:3, 19:20, 21:4,
21:18, 23:19, 24:23,
27:22, 31:23, 32:1,
33:11, 34:13, 36:18,
51:12, 58:22, 66:21,
70:8, 75:7, 81:23,
83:4, 83:24, 86:2,
86:3, 89:8, 93:18,

93:20, 94:24, 105:5,
110:2, 111:10,
121:19, 121:22,
121:25, 122:4,
131:17, 132:2,
133:20, 138:7,
139:16, 141:7,
144:5, 144:9, 145:8,
149:9, 152:11,
155:6, 155:7, 156:24
WHILE [5] - 19:8,
38:18, 63:17, 95:16,
146:12
WHITE [4] - 29:11,
30:1, 30:15, 43:13
WHO [23] - 8:12, 9:19,
15:24, 18:14, 34:4,
37:12, 50:15, 50:23,
53:25, 57:24, 58:18,
59:12, 60:23, 74:22,
81:16, 83:22,
103:18, 109:17,
126:14, 129:25,
131:10, 163:17
WHOLE [11] - 20:21,
24:18, 26:10, 33:13,
37:24, 61:16, 93:4,
130:9, 133:14,
163:11
WHOLENESS [2] -
55:16, 55:17
WHOLLY [1] - 67:16
WHOSE [1] - 163:12
WHOSE'S [1] - 86:7
WHY [21] - 3:9, 12:5,
13:22, 17:7, 50:5,
63:11, 74:14, 74:21,
79:17, 79:25, 83:15,
97:11, 103:21,
131:3, 131:5,
139:17, 140:17,
140:24, 144:10,
152:21, 155:10
WIFE [1] - 113:11
WIFE'S [1] - 68:23
WILL [120] - 3:9, 3:10,
3:16, 3:19, 7:11,
10:20, 12:11, 13:13,
16:17, 20:5, 24:13,
25:11, 27:11, 28:8,
28:23, 29:8, 29:12,
31:15, 31:16, 32:19,
32:21, 32:22, 35:17,
37:14, 40:1, 48:12,
49:18, 49:20, 49:22,
49:23, 49:25, 50:3,
56:19, 56:23, 58:10,
69:1, 70:1, 70:3,
79:6, 79:22, 80:1,
80:2, 85:3, 88:21,
89:5, 89:11, 89:13,
93:17, 94:24, 95:6,
96:17, 99:13,
102:21, 104:15,
104:24, 108:4,
112:12, 117:13,
124:21, 133:3,
135:15, 136:17,
137:5, 137:6,
137:15, 138:4,
138:16, 138:17,
139:13, 140:5,
140:6, 142:8,
142:12, 143:16,
145:18, 145:23,
146:14, 146:19,
147:4, 147:12,
147:22, 147:24,
148:1, 148:22,
149:1, 149:16,
150:24, 151:5,
151:6, 151:9,
151:12, 151:13,
151:14, 151:20,
151:24, 152:1,
152:12, 152:15,
153:2, 153:15,
153:16, 154:5,
156:3, 156:7, 156:8,
156:10, 156:13,
160:22, 161:10,
161:17, 162:11,
163:1, 163:4,
163:10, 163:11,
164:12, 164:13
WILLING [2] - 136:19,
136:22
WISHES [1] - 110:3
WITH [159] - 4:25,
5:12, 7:9, 7:22, 8:15,
9:1, 9:13, 9:16, 9:25,
12:4, 12:8, 12:23,
14:9, 18:13, 20:8,
21:20, 24:22, 25:12,
25:16, 26:6, 27:4,
27:13, 29:23, 31:17,
31:22, 32:25, 33:10,
33:15, 33:20, 34:4,
34:13, 35:4, 38:7,
39:17, 40:3, 40:5,
40:18, 41:12, 42:17,
47:4, 47:9, 47:14,
47:15, 47:19, 49:5,
49:17, 51:1, 51:2,
51:11, 52:7, 53:13,
53:15, 57:10, 59:10,
59:19, 59:20, 59:23,
60:1, 60:7, 61:8,
61:11, 62:19, 62:21,
65:6, 65:8, 65:10,
68:10, 69:17, 71:4,
73:13, 73:17, 75:24,
78:2, 79:20, 81:6,
82:3, 82:4, 82:7,
82:8, 82:18, 83:18,
83:19, 83:21, 84:19,
84:24, 85:10, 89:6,
89:21, 89:22, 90:5,
92:16, 93:13, 94:15,
97:8, 97:24, 98:9,
98:15, 98:17, 98:20,
98:21, 98:24, 98:25,
99:1, 99:5, 99:21,
100:5, 100:9,
100:13, 100:20,
100:21, 100:24,
100:25, 101:3,
101:7, 101:11,
101:16, 102:8,
102:11, 104:18,
105:5, 105:18,
105:23, 110:9,
110:20, 110:22,
111:2, 111:16,
113:25, 114:5,
124:17, 128:14,
128:16, 128:20,
129:5, 130:24,
131:1, 131:21,
132:7, 133:3,
133:16, 137:9,
137:23, 138:14,
138:24, 140:23,
141:21, 143:9,
147:1, 148:17,
149:17, 151:1,
151:11, 155:21,
156:12, 161:18,
162:4, 163:3, 163:15
WITHDRAW/
FAILING [2] - 76:18,
76:19
WITHIN [15] - 37:15,
37:19, 55:10, 60:3,
77:1, 93:25, 94:4,
95:4, 95:15, 95:20,
113:1, 114:23,
115:7, 116:12, 131:8
WITHOUT [15] - 13:2,
25:10, 53:15, 74:3,
74:4, 74:6, 74:15,
74:16, 76:24, 77:12,
116:15, 144:15,
146:6, 161:24
WITNESS [34] - 4:3,
4:8, 4:10, 4:13, 4:17,
53:19, 53:21, 58:9,
58:11, 58:13, 78:10,
79:13, 79:15, 79:16,
79:21, 80:1, 80:11,
80:13, 80:16, 80:20,
103:7, 109:15,
109:17, 110:7,
112:22, 116:3,
121:17, 122:12,
123:7, 123:9,
135:22, 136:10,
146:6, 165:2
WITNESSES [3] -
112:23, 145:8, 146:4
WON'T [4] - 116:24,
119:13, 135:4,
143:15
WORD [3] - 10:25,
54:9, 126:18
WORDS [4] - 132:14,
135:7, 151:4, 151:7
WORK [23] - 5:23,
8:11, 9:5, 9:25, 34:6,
54:5, 64:25, 82:1,
82:5, 95:24, 140:16,
146:14, 147:17,
148:22, 156:13,
158:5, 159:13,
160:13, 163:3,
163:20, 163:22,
164:1, 164:4
WORKED [5] - 81:6,
81:7, 81:10, 103:21,
103:22
WORKER'S [1] - 46:8
WORKING [3] - 55:8,
153:17, 163:15
WORKS [4] - 68:4,
75:9, 112:18, 160:15
WORLD [2] - 46:9,
46:10
WORRIED [1] - 145:25
WORRY [4] - 62:12,
62:15, 62:23, 77:16
WORRYING [3] -
64:23, 64:25, 65:5
WORSE [1] - 39:9
WORST [1] - 163:18
WORTH [1] - 160:11
WOULD [139] - 4:9,
10:14, 16:13, 19:5,
21:12, 21:18, 21:22,
34:9, 39:1, 45:17,
46:1, 46:6, 46:9,
47:21, 48:7, 48:18,
49:3, 50:5, 52:18,
52:19, 52:24, 54:12,
54:15, 55:7, 55:9,
57:23, 58:18, 58:20,
59:15, 60:1, 60:3,
60:6, 60:9, 60:13,
60:25, 61:10, 63:18,
65:17, 65:24, 72:18,
73:7, 73:21, 76:25,
77:11, 78:3, 79:18,
79:23, 80:12, 81:15,
84:4, 84:16, 85:1,
85:13, 86:9, 89:20,
93:14, 96:11, 96:25,
97:2, 97:13, 97:16,
97:17, 102:8, 104:6,
109:25, 110:1,
111:1, 112:15,
114:22, 115:8,
115:12, 115:17,
115:24, 116:11,
116:17, 117:17,
119:15, 120:22,
121:4, 121:25,
124:8, 124:11,
124:14, 125:22,
126:1, 126:15,
126:20, 126:24,
127:4, 129:3, 129:9,
129:11, 129:24,
131:7, 131:14,
131:15, 134:21,
134:24, 136:11,
136:19, 136:22,
136:23, 136:24,
137:1, 137:18,
137:25, 139:8,
139:11, 140:7,
142:25, 143:2,
143:8, 143:9,
143:10, 143:12,
143:13, 144:15,
144:19, 145:19,
146:5, 149:10,
149:14, 150:3,
152:8, 152:11,
153:9, 157:8,
157:23, 158:1,
158:5, 159:5, 161:3,
161:14, 161:21,
162:5
WOULDN'T [4] -
53:13, 74:7, 122:25,
124:3
WRITE [1] - 37:13
WRITES [1] - 96:23
WRITING [6] - 59:25,
145:19, 145:24,
148:1, 148:24, 162:8
WRITTEN [1] - 19:19
WRONG [2] - 162:4,
162:9
WROTE [2] - 36:12,
132:1

X

XR [1] - 56:16

Y

YEAR ^[8] - 5:16, 8:5,
49:9, 81:5, 82:15,
82:18, 83:3, 83:10

YEARS ^[11] - 5:22,
9:24, 12:16, 45:23,
47:17, 60:5, 60:24,
74:18, 81:7, 82:6,
162:17

YELLOW ^[1] - 148:18

YES ^[218] - 5:8, 5:12,
8:2, 8:14, 8:20, 8:22,
9:3, 9:8, 9:16, 10:4,
12:3, 12:24, 13:12,
18:3, 19:18, 23:2,
30:25, 31:9, 43:9,
43:12, 43:14, 43:16,
44:4, 44:6, 44:14,
45:7, 45:19, 46:4,
46:9, 46:24, 47:2,
47:3, 47:6, 48:16,
49:13, 50:18, 52:13,
52:17, 53:9, 55:12,
55:21, 56:3, 56:7,
56:10, 56:13, 57:4,
57:16, 58:22, 59:3,
59:7, 59:14, 59:17,
60:11, 61:6, 61:14,
61:20, 61:24, 63:3,
64:19, 66:8, 66:11,
66:13, 66:17, 67:22,
67:25, 68:5, 68:13,
69:5, 69:11, 70:8,
70:17, 71:5, 71:10,
71:21, 72:13, 72:25,
73:6, 73:10, 73:15,
73:19, 73:22, 74:1,
75:25, 76:1, 76:5,
76:14, 76:21, 77:7,
77:10, 77:13, 77:21,
80:7, 81:10, 82:4,
82:8, 83:13, 84:4,
84:14, 85:11, 86:15,
87:3, 87:14, 87:25,
88:13, 88:15, 88:19,
89:13, 90:9, 90:20,
91:6, 91:17, 92:8,
92:20, 92:22, 92:25,
93:14, 98:17, 98:22,
99:1, 99:7, 99:11,
100:15, 100:22,
101:1, 101:5, 101:9,
101:13, 101:19,
102:16, 106:4,
106:13, 107:16,
108:2, 109:11,
110:7, 110:18,
110:23, 111:2,
111:10, 111:17,

111:19, 112:13,
113:16, 113:18,
114:13, 115:11,
115:18, 115:20,
116:7, 116:17,
117:3, 117:6, 118:7,
118:12, 118:14,
118:17, 118:20,
118:23, 118:25,
119:2, 119:5,
119:10, 119:18,
119:21, 119:24,
120:4, 120:6, 120:9,
120:13, 120:18,
120:25, 121:23,
122:2, 122:5,
123:13, 123:18,
123:23, 123:25,
124:2, 125:2, 125:5,
125:10, 125:25,
126:11, 126:22,
127:1, 130:14,
132:10, 134:2,
134:10, 134:16,
135:9, 135:25,
137:1, 137:12,
137:17, 141:16,
141:17, 142:7,
142:20, 143:24,
145:5, 145:6, 146:8,
154:25, 155:8,
159:1, 161:7, 162:2,
162:7
YET ^[1] - 147:10
YIN ^[4] - 31:18, 31:22,
31:25, 32:9
YOU ^[719] - 3:22, 4:3,
4:4, 4:9, 4:12, 4:15,
5:7, 5:11, 5:18, 6:25,
7:22, 8:9, 8:10, 8:12,
8:15, 8:19, 8:21,
8:25, 9:5, 9:13, 9:18,
9:25, 10:11, 10:12,
10:14, 11:5, 11:10,
11:15, 11:23, 13:14,
13:23, 14:1, 14:18,
14:19, 14:23, 15:25,
16:17, 16:20, 16:22,
17:7, 17:14, 17:16,
17:19, 17:20, 17:21,
17:22, 18:1, 18:4,
18:22, 18:23, 18:24,
19:16, 19:23, 19:25,
20:1, 20:3, 20:4,
20:5, 21:1, 21:25,
22:25, 23:3, 23:10,
23:16, 23:24, 24:13,
24:17, 26:8, 26:10,
27:8, 27:16, 28:9,
28:14, 29:10, 29:13,
29:19, 30:18, 30:20,

31:24, 32:3, 32:14,
33:7, 33:20, 33:24,
34:2, 34:9, 34:17,
34:23, 34:25, 35:3,
35:20, 35:23, 36:15,
36:17, 36:22, 37:21,
37:24, 38:12, 39:5,
39:13, 40:11, 41:5,
41:20, 41:21, 41:22,
42:12, 42:25, 43:1,
43:2, 43:6, 43:7,
43:17, 43:20, 43:23,
44:2, 44:5, 44:7,
44:10, 44:12, 45:6,
45:8, 45:11, 45:12,
45:17, 45:18, 45:20,
46:1, 46:5, 46:6,
46:7, 46:15, 46:17,
46:19, 46:22, 46:25,
47:4, 47:9, 47:18,
47:21, 48:9, 48:12,
49:3, 49:5, 49:8,
49:11, 49:16, 49:22,
49:23, 50:2, 50:3,
50:5, 50:14, 50:17,
50:21, 50:25, 51:19,
51:23, 52:7, 52:9,
52:12, 52:14, 52:17,
53:4, 53:9, 53:20,
54:20, 55:4, 55:8,
55:9, 55:13, 55:22,
56:1, 56:4, 56:24,
57:2, 57:6, 57:21,
57:23, 58:18, 59:4,
59:8, 59:9, 59:10,
59:16, 59:18, 59:19,
59:25, 60:1, 60:4,
60:6, 60:9, 60:21,
61:3, 61:10, 61:21,
61:23, 62:3, 62:4,
62:7, 62:8, 62:17,
62:18, 62:20, 62:25,
63:1, 63:4, 63:5,
63:11, 63:22, 64:4,
64:5, 64:17, 64:20,
65:15, 65:23, 65:25,
66:1, 66:4, 66:6,
66:9, 66:14, 66:16,
66:18, 66:19, 66:20,
66:25, 67:7, 67:9,
67:20, 67:23, 68:1,
68:4, 68:7, 68:8,
68:13, 68:16, 68:24,
69:2, 69:3, 69:6,
69:9, 70:2, 70:5,
70:11, 70:13, 70:17,
70:20, 70:21, 70:24,
71:2, 71:11, 71:13,
71:16, 71:17, 71:19,
71:22, 71:25, 72:2,
72:11, 72:14, 72:18,

72:22, 72:23, 73:3,
73:7, 73:10, 73:20,
74:7, 74:14, 74:25,
75:16, 75:23, 76:2,
76:3, 76:6, 76:8,
76:9, 76:12, 76:17,
76:20, 76:22, 77:5,
77:8, 77:24, 78:1,
78:22, 78:25, 79:11,
79:12, 79:13, 79:15,
79:20, 79:21, 80:3,
80:6, 80:7, 80:9,
80:12, 80:14, 80:18,
81:4, 81:6, 81:8,
82:2, 82:6, 82:10,
82:12, 84:12, 85:18,
85:23, 86:15, 88:23,
89:10, 89:11, 89:14,
89:15, 89:18, 89:20,
93:3, 93:5, 93:11,
93:17, 94:18, 94:24,
95:25, 96:6, 96:18,
97:4, 97:13, 97:17,
97:21, 98:2, 98:3,
98:4, 99:16, 100:3,
100:15, 100:19,
100:21, 101:8,
101:12, 101:16,
102:18, 102:19,
102:24, 102:25,
103:3, 103:6, 103:8,
103:25, 104:1,
104:6, 104:11,
105:11, 105:13,
105:25, 106:9,
106:22, 108:3,
108:4, 109:6,
109:13, 109:14,
109:17, 109:21,
109:24, 109:25,
110:1, 110:3, 110:6,
110:7, 110:13,
110:14, 110:16,
110:19, 110:20,
111:12, 111:13,
111:16, 111:20,
112:5, 112:9,
112:11, 112:12,
112:19, 112:21,
112:22, 113:7,
113:9, 113:12,
113:14, 113:17,
113:22, 114:6,
114:7, 114:8,
114:11, 114:12,
114:17, 114:19,
114:25, 115:1,
115:2, 115:3,
115:13, 115:15,
115:16, 115:17,
115:18, 115:23,

116:2, 117:1, 117:8,
117:22, 118:1,
118:4, 118:8, 118:9,
118:15, 118:18,
118:25, 119:3,
119:15, 119:22,
120:2, 120:6,
120:16, 120:19,
120:20, 121:15,
122:11, 122:12,
122:24, 123:6,
123:9, 123:10,
123:11, 123:14,
123:16, 123:19,
124:9, 124:20,
124:22, 125:3,
125:9, 125:14,
125:19, 125:20,
125:21, 125:23,
125:24, 126:2,
126:5, 126:9,
126:18, 127:19,
127:25, 128:13,
128:19, 129:17,
130:6, 130:10,
130:19, 131:20,
131:21, 131:22,
132:9, 132:11,
132:12, 132:14,
132:17, 133:3,
133:13, 134:5,
134:8, 134:11,
134:17, 135:8,
135:20, 135:21,
135:22, 136:2,
136:4, 136:8, 136:9,
136:10, 136:12,
136:14, 136:17,
136:19, 136:22,
136:23, 136:24,
137:4, 137:5, 137:8,
137:10, 137:11,
137:13, 137:14,
137:15, 137:18,
138:15, 138:16,
138:17, 138:23,
139:1, 139:2, 139:8,
139:13, 139:17,
139:18, 140:7,
140:8, 140:10,
140:11, 140:12,
140:13, 140:14,
140:15, 140:19,
140:20, 141:4,
141:6, 141:8, 141:9,
141:14, 141:23,
141:24, 141:25,
142:8, 142:9,
142:13, 142:14,
142:19, 143:4,
143:5, 143:8, 143:9,

143:21, 143:23,
 144:3, 144:5, 144:6,
 144:7, 144:8,
 144:10, 144:18,
 144:19, 144:21,
 144:22, 145:18,
 145:23, 146:14,
 146:16, 146:17,
 146:19, 146:23,
 146:25, 147:5,
 147:16, 147:21,
 148:2, 148:3, 148:5,
 148:13, 148:17,
 148:22, 149:1,
 149:19, 149:21,
 149:22, 150:18,
 150:19, 150:21,
 150:22, 150:23,
 151:5, 151:12,
 151:13, 151:14,
 151:18, 151:19,
 151:24, 152:12,
 152:13, 152:16,
 153:8, 153:11,
 153:12, 153:13,
 153:15, 154:13,
 154:21, 155:6,
 155:18, 155:22,
 155:24, 155:25,
 156:2, 156:3, 156:7,
 156:8, 156:11,
 156:15, 156:23,
 157:9, 157:10,
 157:11, 158:1,
 158:10, 158:16,
 158:19, 158:21,
 158:24, 159:3,
 159:4, 159:7,
 159:11, 159:15,
 159:21, 159:22,
 160:2, 160:4, 160:6,
 160:9, 160:11,
 160:12, 160:19,
 161:1, 161:2,
 161:10, 161:12,
 161:13, 161:21,
 161:23, 161:25,
 162:1, 162:4, 162:5,
 162:6, 162:9,
 162:13, 163:15,
 163:21, 163:22,
 163:25, 164:4,
 164:5, 164:6, 164:7,
 164:13, 164:15,
 164:16, 164:17,
 164:18
YOU'RE^[1] - 110:15
YOUNG^[2] - 57:17,
 77:17
YOUR^[181] - 3:24,
 3:25, 4:3, 4:4, 4:8,
 4:12, 4:16, 4:23,
 7:13, 8:11, 9:5, 10:5,
 11:6, 11:22, 14:11,
 14:14, 14:15, 15:6,
 20:6, 22:5, 23:11,
 23:24, 32:4, 35:14,
 44:18, 44:24, 45:4,
 45:7, 46:14, 47:24,
 48:17, 49:15, 51:4,
 51:5, 55:7, 63:21,
 63:24, 65:16, 67:18,
 68:22, 68:23, 73:2,
 73:16, 74:13, 78:7,
 78:12, 78:15, 79:9,
 79:10, 79:11, 79:16,
 80:7, 80:11, 80:15,
 80:19, 81:1, 81:21,
 82:1, 82:5, 85:17,
 86:20, 89:12, 89:16,
 89:21, 100:13,
 102:17, 103:6,
 103:10, 103:23,
 109:7, 109:10,
 109:11, 109:16,
 109:24, 110:5,
 110:7, 112:6,
 112:11, 112:13,
 112:23, 114:22,
 116:1, 120:21,
 121:11, 122:9,
 122:12, 123:7,
 123:24, 125:21,
 125:24, 126:4,
 128:2, 128:16,
 128:18, 128:19,
 128:22, 128:25,
 129:19, 130:4,
 131:4, 131:20,
 131:25, 132:7,
 132:10, 132:13,
 132:20, 133:6,
 134:4, 134:10,
 135:17, 135:21,
 135:22, 135:24,
 135:25, 136:4,
 136:15, 136:21,
 137:1, 137:6,
 137:12, 137:16,
 137:18, 138:5,
 138:18, 138:19,
 139:17, 140:7,
 140:10, 140:15,
 140:16, 141:14,
 141:18, 142:3,
 142:7, 142:20,
 143:7, 143:10,
 143:24, 144:11,
 144:21, 144:25,
 145:6, 145:18,
 146:2, 149:21,
 150:17, 151:2,
 151:14, 152:3,
 153:10, 155:23,
 155:24, 156:1,
 156:4, 158:4, 159:1,
 159:20, 159:24,
 160:7, 160:14,
 160:19, 161:10,
 161:25, 162:6,
 162:9, 162:11,
 163:21, 164:7,
 164:15
YOURS^[1] - 163:12
YOURSELF^[3] - 46:1,
 136:9, 159:22

Z

ZERO^[3] - 69:20,
 95:6, 102:15
ZOLOFT^[1] - 23:22
ZOOLOGY^[1] - 76:13
ZOOM^[11] - 27:6,
 33:5, 62:9, 65:25,
 67:21, 70:19, 97:19,
 113:20, 119:7,
 120:5, 120:6